

Interest Analysis as Constitutional Law

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I. INTRODUCTION

The Supreme Court struck down a forum's choice of its own law in *Phillips Petroleum Co. v. Shutts*.¹ In doing so, it may have moved toward recasting as constitutional doctrine, modes of interest analysis familiar to choice of law. However, the Supreme Court's explanation of the role of interest analysis in constitutional law remains quite tentative. This Article will discuss what the Court has done and ought to do with the device.

I will first discuss a challenge that, if well founded, renders any kind of constitutional review of conflicts decisions inconsequential: The minimum contacts constraint on territorial jurisdiction so reduces courts' opportunities for conflicts abuses that there is no real need for the Supreme Court to review conflicts decisions. The salutary effects of the minimum contacts test on choice of law should not be discounted. But I will suggest that it can leave courts free to exercise territorial jurisdiction in ways that violate even the relatively modest constitutional standards for conflicts decisions currently imposed by the Court.

This Article will then turn to some questions raised by interest analysis as constitutional law. What is or should be the difference between interest analysis used in choice of law and used to justify Supreme Court invalidation of conflicts decisions? Are there reasons why the Supreme Court should distance itself from the choice-of-law process? If there are, can the Court maintain that distance when using interest analysis as a core element of reviewing doctrine? In considering these matters, I hope to shed some light on recent developments and to provide a framework for discussing broader questions. Is interest analysis out of place as constitutional law? If not, should the Supreme Court take the concept further than it already has in regulating choice of law?

This Article will suggest why interest analysis is an intelligible and efficient device for implementing full faith and credit and due process policies, and how the Court should use an interest requirement in the future to expand the Constitution's role in restraining conflicts excesses. There is much to recommend in a flat rule prohibiting any choice of law unsupported by interest over the conflicting law of an interested jurisdiction. This Article proposes that the Supreme Court should at least declare that a disinterested forum may never choose its conflicting law over that of another, interested state.

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1. 472 U.S. 797 (1985).

II. INTEREST ANALYSIS

To Brainerd Currie, its principal architect, interest analysis was a means of separating "true" from "false" conflicts.² The approach examined particular policies behind competing substantive rules.³ When the policy of a rule was at stake on the facts of the case, the jurisdiction from which it was taken was said to be "interested" in having it applied.⁴ A true conflict occurred when the facts implicated substantive policies supporting the rules of more than one place and the rules led to opposing results. A false conflict occurred either when the rules produced the same result, or when the facts of the case were capable of frustrating policy supporting only one of two ostensibly conflicting rules.⁵

Currie's more radical ideas about the role and function of interest analysis never really caught on.⁶ However, the functional core of interest analysis described in the preceding paragraph⁷ became a mainstay of choice-of-law theory over the last twenty-five years.⁸ A great many judicial opinions and law review articles have

2. See generally B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) [hereinafter cited as B. CURRIE, *SELECTED ESSAYS*]; Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.

3. Currie was not alone in criticizing the lack of sensitivity of the courts and the original Restatement to this dimension of choice of law. See, e.g., Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Note, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

4. For further discussion of Professor Currie's approach see E. SCOLES & P. HAY, *CONFLICT OF LAWS* 16-20 (1982); Cavers, *Contemporary Conflicts Law in American Perspective*, 131 RECUEIL DES COURS 75, 146-49 (1970); Shreve, *Currie's Governmental Interest Analysis—Has It Become a Paper Tiger?*, 46 OHIO ST. L.J. 541 (1985) [hereinafter cited as Shreve, *Currie*].

5. E. SCOLES & P. HAY, *supra* note 4, at 17-18. It is obvious why the first is a false conflict. The contribution of interest analysis was to unmask the second type as false as well. Many decisions used this approach to dispose of illusory conflicts without adopting the true-false terminology. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), is a famous example. The New York Court of Appeals applied New York tort law permitting passengers to recover against their drivers instead of conflicting Ontario law. New York was interested because the purpose of its rule facilitating recovery was to compensate, and the most obvious beneficiaries of that compensatory concern were New Yorkers like the plaintiff. But the Court of Appeals found that Ontario's interest was at best "minimal." The court determined that the purpose of the Ontario rule blocking recovery was to prevent collusion by guests and their drivers against their insurance companies. Therefore, reasoned the court, Ontario would have been interested in the application of its law only if the defendant and insurer were from Ontario. They were from New York. That left Ontario without a legitimate basis for interest in the outcome. "Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there" *Id.* at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

6. He viewed courts as incapable of determining the more interested of two interested jurisdictions and maintained that a genuinely interested forum should always apply its own law. See *infra* note 108. Currie later subdued the tone of his argument, Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 763 (1963), but never retreated from his central premise. Courts largely ignored this aspect of Currie's work. See Shreve, *Currie*, *supra* note 4, at 542. For a spirited critique of Currie's work generally, see Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985) [hereinafter cited as Brilmayer, *Governmental Interest*].

7. This is the meaning of interest analysis I intend in this Article. This assumes that it is possible to separate core principles of interest analysis from the more volatile aspects of Currie's choice-of-law method (which may be called governmental interest analysis), described *supra*, at note 6. I have attempted to demonstrate elsewhere that this is a useful distinction, and that the functional core of interest analysis has become a central trans-methodological component in modern choice of law. See Shreve, *Currie*, *supra* note 4. In addition, see *infra* note 8 and accompanying text.

8. Some jurisdictions resolve conflicts problems without the aid of interest analysis. See *infra* note 163. But it figures prominently in the choice-of-law approaches which have appealed to most courts, see *infra* notes 70-76 and accompanying text, and in the writing of the most influential commentators, A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS—CASES AND MATERIALS ON CONFLICT OF LAWS* (1965); D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (3rd ed. 1986) [hereinafter cited as R. WEINTRAUB, *COMMENTARY*]. For an interesting and generally sympathetic discussion of interest analysis, see Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, 19 DUQUENSE L. REV. 207 (1981). But see Brilmayer, *Governmental Interest*, *supra* note 6; Juenger, *What Now?*, 46 OHIO ST. L.J. 509 (1985); Kozyris, *Interest Analysis Facing*

charted the growth, applications, and limits of the device in choice of law.⁹ It is reasonable to ask whether so pervasive a concept could not only help to separate good from bad conflicts decisions, but also might have a role to play in constitutional doctrine regulating choice of law.

Professor Currie held this view. He wrote "that a state court's choice of law will be upset under the full faith and credit clause or the due process clause only when the state whose law is applied has no legitimate interest in its application"¹⁰ As Professor Sedler recently observed,¹¹ Currie was really advancing two propositions. First, it is constitutional for an interested forum to apply its own law to resolve a true conflict. Second, a forum cannot constitutionally choose the law of an uninterested place. The details of Currie's constitutional theory have faded in importance,¹² but these two propositions have not. The *Shutts* Court reaffirmed the first and may have moved somewhat toward the second. Let us examine the case more closely.

III. PHILLIPS PETROLEUM CO. v. SHUTTS

From 1974 to 1978, Phillips suspended royalty payments on gas obtained from a large number of leases while awaiting rate decisions from the Federal Power Commission (now the Federal Energy Regulatory Commission). These "suspense royalties" were paid once Phillips received FPC approval for rate increases. Shutts and two others filed suit in Kansas state court individually and on behalf of a class of persons from whom funds had been withheld, challenging the failure of Phillips to include interest in its eventual payments.

The trial court certified a royalty-owner class and reduced it, by subtracting those who opted out or who could not be notified by first class mail, to approximately 28,100 members. The trial court determined the value of the average class claim to be under \$100. Citizenship of the class was scattered over many states. The affected gas leases were located in eleven states. The number of Kansas residents in the class as well as the number of gas leases located in Kansas were insignificant.¹³ Phillips was neither incorporated nor had its principal place of business in Kansas.

its Critics - And Incidentally What Should be Done About Choice of Law for Products Liability?, 46 OHIO ST. L.J. 569 (1985) (each expressing misgivings about utilization of even a benign form of interest analysis in choice of law).

9. See, e.g., sharply conflicting judicial opinions over the appropriate application of interest analysis in the majority and dissenting opinions in *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965). For a sample of varied views on interest analysis among commentators, see *Interest Analysis in Conflict of Laws: An Inquiry Into Fundamentals With a Side Glance at Products Liability*, 46 OHIO ST. L.J. 458 (1985) (symposium with contributions by Kozyris, Brilmayer, Sedler, Weintraub, Juenger, Evrigenis, Berman, Zaphiriou, Shreve, Luneburg, and Symeonides).

10. B. CURRIE, SELECTED ESSAYS, *supra* note 2, at 271.

11. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack"*, 46 OHIO ST. L.J. 483, 488 (1985).

12. For criticisms, see, e.g., Brilmayer, *Governmental Interest*, *supra* note 6, at 472; Ely, *infra* note 25, at 180. Cf. Sedler, *supra* note 11, at 487 ("Suffice it to say that Currie was a much better conflicts scholar than a constitutional scholar."). Professor Sedler's observation seems correct, but ironic, since Currie's views on conflicts were shaped in substantial part by conclusions he reached on constitutional topics. B. CURRIE, SELECTED ESSAYS, *supra* note 2, at 188-360, 445-583. See *supra* note 6.

13. "[O]ver 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit." 472 U.S. 797, 814-15 (1985).

After trial, the court determined that the class was entitled to interest on the suspense royalties during the period Phillips withheld them and set the interest rate. The Kansas Supreme Court modified the interest rate, but otherwise affirmed.¹⁴ It continued the practice it had followed in earlier, related litigation¹⁵ of deciding the case by referring solely to Kansas law.¹⁶ The Kansas Supreme Court purported to follow a "general rule . . . that the law of the forum applies unless it is expressly shown that a different law governs," adding, "in case of doubt, the law of the forum is preferred."¹⁷ On certiorari, the United States Supreme Court reversed.¹⁸

The Court recognized that it would be idle to scrutinize the choice-of-law decision unless application of Kansas law interfered with the selection of other law more favorable to the petitioner.¹⁹ However, it found the Kansas Supreme Court's summary conclusion that no conflict existed to be unconvincing. Some of the class claims derived from gas leases located in Oklahoma, Texas, and Louisiana. The Court noted the possibility that petitioner would not be liable under Oklahoma or Texas law, and the possibility that, even if liable, petitioner would be subject to a lower interest rate under the laws of Oklahoma, Texas, and Louisiana. The Supreme Court declined to do more than raise the possibility of conflicts,²⁰ but found that was reason enough to keep the judgment from taking effect.²¹ "Whatever practical

14. *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159 (1984).

15. *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978).

16. "The Kansas courts . . . found petitioner liable for interest on the suspended royalties as a matter of Kansas law, and set the interest rates under Kansas equity principles." 472 U.S. 797, 816 (1985).

17. 235 Kan. 195, 221-22, 679 P.2d 1159, 1181 (1984). It felt especially justified in applying the rule with added force because it was adjudicating "a nationwide class action." Kansas law was to be applied in such cases, "unless compelling reasons exist for applying a different law." The Kansas Supreme Court found none.

18. Justice Rehnquist wrote for a seven-member majority. Justice Powell did not participate in the decision. Justice Stevens dissented. The conflicts dimension of the case was somewhat obscured prior to the Supreme Court's decision. To reach it, the Court had to make new law that personal jurisdiction over passive, nonresident members of the plaintiff class did not offend due process, *infra* notes 65-66 and accompanying text, and overturn a finding of the Kansas Supreme Court that the laws of other jurisdictions which might have been applied to some of the controversies were not in conflict with Kansas law, *see infra* notes 20-21 and accompanying text.

19. "There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit." 472 U.S. 797, 816 (1985).

20. "We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit. . . ." 472 U.S. 797, 823 (1985).

21. "These putative conflicts range from the direct to the tangential, and may be addressed by the Supreme Court of Kansas on remand under the correct constitutional standard." *Id.* at 816. Dissenting, Justice Stevens would not have disturbed the Kansas court's no-conflict determination. "The crux of my disagreement," he wrote:

is over the standard applied to evaluate the sufficiency of allegations of choice-of-law conflicts necessary to support a constitutional claim. Rather than potential, 'putative,' or even 'likely' conflicts, I would require demonstration of an *unambiguous* conflict with *established* law of another State as an essential element of a constitutional choice-of-law claim.

472 U.S. 797, 840-41 (1985) (emphasis in original). Justice Stevens suggested that the Kansas Supreme Court might be entirely right in its analysis of the laws of other states. But he went on to say that the Court should have accepted the no-conflict conclusions, even if the Kansas court reached it through good-faith error. *Id.* at 834-35. Acknowledging that "even a good faith review of another State's law" might in some cases violate the full faith and credit clause, Justice Stevens argued that this case did not reveal such a "blunder." *Id.* at 836.

Justice Stevens stopped short of suggesting that there was no demonstrable federal issue in the case which, if resolved differently, would change the outcome. Since there was, the Court acted properly in addressing it. *E.g.*, *Michigan v. Long*, 463 U.S. 1032 (1983). *See* M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 221 (1980). But Justice Stevens' dissent does raise for *Shutts* the question which has been raised generally about the Court's use of its discretionary appellate jurisdiction, Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U.L. REV. 677 (1984). Did the case really justify the Court's attention?

reasons may have commended this rule to the Supreme Court of Kansas," concluded the Court, "we do not believe that it is consistent with the decisions of this Court."²²

The Supreme Court based its decision on the due process²³ and full faith and credit²⁴ clauses of the Constitution,²⁵ making little effort²⁶ to separate the two in its analysis.²⁷ The Court began with a premise taken from the plurality opinion in *Allstate Insurance Co. v. Hague*:²⁸ "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact, or significant aggregation of contacts, *creating state interests*, such that choice of its law is neither arbitrary nor fundamentally unfair."²⁹ The Court noted that it had affirmed

Professor Weintraub expressed doubt, suggesting "*Shutts* may have used the cannon of constitutional limits on choice of law to slay a gnat" R. WEINTRAUB, COMMENTARY, *supra* note 8, at 529.

But perhaps the decision was justified. Assume the Court granted certiorari so it could decide the personal jurisdiction issue in *Shutts*. It would be difficult to fault the Court for using its discretionary jurisdiction to address a question which was both quite important and well-presented on the record, *see infra* notes 65-66 and accompanying text. Petitioner also had challenged the choice-of-law result, and—given its conclusion that personal jurisdiction existed—the Court had little choice but to go on. Moreover, even if the record in *Shutts* did not provide the best vehicle for refining constitutional doctrine, the clouded analysis and plurality status of the preceding case, *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), had generated widespread confusion and controversy. The *Shutts* Court might have seen a return to the subject as an opportunity to bring some stability to the field. And they did. *Shutts* communicates a standard of constitutional accountability in choice of law "in a much clearer and convincing fashion than had *Hague*. It shows clearly that a limit indeed remains beyond which a state may not apply its own law." E. SCOLES & P. HAY, *supra* note 4, at 8 (1986 Supp.).

22. 472 U.S. 797, 823 (1985). In a later case, *Wortman v. Sun Oil Co.*, 690 P.2d 385 (Kan. 1984), the Kansas Supreme Court again applied Kansas law to all claims in a nation-wide class action for unpaid interest on suspense royalties, this time against another oil company. In one order, the United States Supreme Court granted certiorari, vacated judgment, and remanded the case "for further consideration in light of *Phillips Petroleum Company v. Shutts*" *Sun Oil Co. v. Wortman*, 106 S. Ct. 40, 41 (1985).

23. U.S. CONST. amend XIV.

24. U.S. CONST. art. IV, sec. 1.

25. 472 U.S. 797, 816-17, 822 (1985). *Shutts* thus confirmed Professor Martin's earlier observation that the due process and full faith and credit clauses of the Constitution were "the only provisions successfully invoked with any regularity." Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 186 (1976) [hereinafter cited as Martin, *Constitutional Limitations*]. In addition, *see* Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61 (1978). The primary focus of this Article will be on opportunities for regulating choice of law provided by due process and full faith and credit. For argued applications of other parts of the Constitution, *see* B. CURRIE, *SELECTED ESSAYS*, *supra* note 2, at 305-07 (equal protection); Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 174 (1981) (privileges and immunities). *See generally* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 135-36 (1976); Martin, *Constitutional Limitations*; Note, *Unconstitutional Discrimination in Choice of Law*, 77 COLUM. L. REV. 272, 273 (1977).

26. The Court did note that the dissent in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 335-36 (1981), "stressed that the Due Process Clause prohibited the application of law which was only casually or slightly related to the litigation, while the Full Faith and Credit Clause required the forum to respect the laws and judgments of other States, subject to the forum's own interests in furthering its public policy." 472 U.S. 797, 819 (1985). But the Court failed to use this distinction in its discussion of the *Shutts* case.

27. The Court drew criticism from Justice Stevens' dissent for treating the two "as though they imposed the same constraints on the forum court." 472 U.S. 797, 824 (1985). While the due process and full faith and credit clauses do advance different policies, *infra* notes 145-48, the view in conflicts literature is widespread that, at least when the choice is between laws from different states of the union, the clauses function interchangeably as a basis for choice-of-law review. Cavers, *supra* note 4, at 110; Martin, *Constitutional Limitations*, *supra* note 25, at 186; Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1589 (1978) [hereinafter cited as Reese, *Legislative Jurisdiction*]. But *see* the position taken in this Article, *infra* notes 142-60 and accompanying text (assigning different functions to the two clauses but disagreeing with Justice Stevens' view that the two clauses should be used separately to weigh conflicts decisions).

28. 449 U.S. 302 (1981).

29. 472 U.S. 797, 818 (1985) (quoting *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13) (emphasis added). The Court added that the dissenters in *Hague* "were in substantial agreement with this principle." *Id.* at 818-19. That may be an understatement. Writing for the Chief Justice and Justice Rehnquist, Justice Powell stated:

At least since *Carroll v. Lanza*, 349 U.S. 408 (1955), the Court has recognized that both the Due Process and

Minnesota courts' choice of forum law in *Hague* "because of the forum's significant contacts to the litigation which supported the State's interest in applying its law."³⁰ Then it examined whether Kansas had a corresponding interest in applying its law to adjudicate all of the class claims in *Shutts* and concluded that it did not.

The Supreme Court surveyed four types of contacts which had been mentioned by the Kansas Supreme Court: (1) petitioner's business activity within Kansas; (2) Kansas citizenship of some of the class claimants; (3) the wish of the class members to have Kansas law applied; and (4) the suggestion that the lawsuit created something like a "common fund" in Kansas. The Court never suggested that the first two types of contacts were not interest-generating. Presumably, Kansas could apply its law to the relatively few claims³¹ supported by these contacts. But the Court made clear that types three and four suggested no Kansas interest at stake in the controversy. The Court rejected the Kansas Supreme Court's analogy to an older "common fund" case³² and refused to attach significance to the desire of the plaintiff class to have Kansas law apply.³³

This meant that most of the class claims were incapable of supporting the application of Kansas law. "Given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas," concluded the Supreme Court, "applicaton of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits."³⁴ The Court described the harm it wished to avert by imposing an interest requirement. "When considering fairness in this context, an important element is the expectation of the parties." Turning to the facts of *Shutts*, the Court stated: "There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control."³⁵

the Full Faith and Credit Clauses are satisfied if the forum has such significant contacts with the litigation that it has a legitimate state interest in applying its own law.

449 U.S. 302, 333 (1981) (dissenting opinion).

What the *Shutts* Court says about its own case and about *Hague* at least opens the way for giving "interest" the same meaning in constitutional law that it has (*see supra* note 7 and accompanying text) in the choice of law process. For further indication of this, compare the Court's use of "false conflicts" in its constitutional analysis, 472 U.S. 797, 818 (1985), with identical and widespread use of the same term in choice of law. *See supra* note 5 and accompanying text. To suggest that the forum must be interested in this sense in order to apply its own law would give the Constitution a larger role in regulating choice of law. This definition of interest differs from the more permissive conception of constitutionally sufficient interest established prior to *Hague* that the forum applying its law either be interested in the choice-of-law sense or have contacts with the case in lieu of interest. *See infra* notes 136 and 137 and accompanying text. *Shutts* seems to have rejected contacts which may have been capable of supporting interest in the narrower sense. *See infra* note 138 and accompanying text. While it may go too far to suggest that *Shutts* alone represents a breakthrough, the case draws more from modern interest analysis than any prior case in striking down a forum's choice of its own law. True, the Court had earlier rejected claims that public policy required the forum to reject out-of-state law. *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930); *Hughes v. Fetter*, 341 U.S. 609 (1951), but these cases dealt with assertions of an inchoate forum of local interest, then sporadically invoked to evade a choice-of-law approach which was the antithesis of interest analysis. *See infra* note 168.

30. 472 U.S. 797, 819 (1985).

31. *See supra* note 13.

32. *Hartford Life Ins. Co. v. IBS*, 237 U.S. 662 (1915).

33. The Court quoted from the *Hague* dissent: "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." 472 U.S. 797, 820 (1985) (quoting *Hague*, 449 U.S. 303, 337 (1981)).

34. *Id.* at 822.

35. *Id.* Quoting from its decision in *Home Insurance Co. v. Dick*, 281 U.S. 397, 410 (1930), the Court added:

IV. THE TENDENCY OF THE MINIMUM CONTACTS TEST TO CHECK CONFLICTS ABUSES—IS CONSTITUTIONAL REVIEW OF CHOICE OF LAW REALLY NECESSARY?

The *Shutts* Court stated that "[t]he issue of personal jurisdiction" in the case was "entirely distinct from the question of constitutional limitations on choice of law."³⁶ Perhaps the Court only meant to say that it has never shaped its personal (territorial³⁷) jurisdiction doctrine with the object of regulating choice of law, and that the same cannot be relied upon as a complete surrogate for constitutional supervision of conflicts decisions. But it would be a mistake to read the statement more broadly, to suggest that the two function in entirely separate spheres. The incidental effect of due process restrictions on territorial jurisdiction can be significant in checking choice-of-law abuses. The particular reach of these restrictions—contained in the Court's minimum contacts test³⁸—should be considered in order to determine whether constitutional doctrine directly addressing choice of law is even necessary.³⁹

The line between bad conflicts decisions which arguably violate the Constitution and bad decisions which are merely regrettable is not easy to draw. Without placing

"Kansas 'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" 472 U.S. 797, 822 (1985).

36. *Id.* at 821. Similar statements can be found in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 317 (1981); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 215 (1978); *Hanson v. Denckla*, 357 U.S. 235, 254 (1958). See generally Hay, *The Interrelation of Jurisdiction and Choice of Law in United States Conflicts Law*, 28 INT'L & COMP. L.Q. 161 (1979); Hill, *Choice of Law and Jurisdiction in The Supreme Court*, 81 COLUM. L. REV. 960 (1981); Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980) [hereinafter cited as Martin, *Personal Jurisdiction*].

37. Personal jurisdiction is a subcategory of territorial jurisdiction. See *infra* note 43.

38. The Supreme Court drew its minimum contacts test from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and refined it in succeeding cases. In essence, the test probes the relationship between the forum state and a nonresident defendant (either through the controversy or more generally) in order to determine whether forcing the defendant either to participate in the proceedings or be bound by a default judgment satisfies the fairness guarantee of due process. Whether contacts between the defendant and the forum reach the constitutional minimum is determined with reference to one or both of the following inquiries: (1) Would it subject the defendant to unfair surprise or undue hardship to force her to defend in the forum selected by the plaintiff? (2) Has the defendant's involvement with affairs occurring in the forum state been such as to warrant imposition of the forum's sovereign, regulatory authority against her? The two inquiries overlap. Defendant's controversy-related forum involvement (or more extensive forum involvement unrelated to the controversy) may suggest that the forum is neither a surprising nor particularly inconvenient place for her to defend. The Supreme Court has been far less willing to accord legitimacy to contacts between the plaintiff and the forum state, e.g., *Hanson v. Denckla*, 357 U.S. 235 (1958), but it recently indicated in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 783 (1984), that they might be a factor in close cases. Various aspects of the minimum contacts test are described, criticized, and defended in Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77; Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411 (1981); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; Jay, "Minimum Contacts" As a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C.L. REV. 429 (1981); Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983); von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279 (1983); and Comment, *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

After *Asahi Metal Industry Co. v. Superior Court*, 107 S. Ct. 1026 (1987), there is some basis for allocating the due process concerns noted in the preceding paragraph between minimum contacts and "reasonableness" tests. For convenience, I will associate all of them with the minimum contacts test, something which the court has often done, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

39. Professor Martin argued for an approach to regulating choice of law based on minimum contacts. "The time has come," he wrote, "for the Supreme Court to declare that a state may not apply its own law to a case unless it has the 'minimum' contacts required by *International Shoe* for the exercise of specific personal jurisdiction over the defendant." Martin, *Personal Jurisdiction*, *supra* note 36, at 872 (footnotes omitted).

too much emphasis on the matter at this stage of the discussion,⁴⁰ it is enough to say that the most suitable conflicts decisions for constitutional review usually have been cases in which the forum applied its own substantive law without justification and to the detriment of a nonresident defendant. Before courts can perform such mischief, they must be able to exercise a quality of territorial jurisdiction over the same nonresident defendant capable of satisfying due process. It follows, then, that the more stringent the due process standards for territorial jurisdiction are, the fewer opportunities will occur for conflicts decision-making so bad as to warrant constitutional intervention.

Two territorial jurisdiction cases have had the clear if incidental effect of reducing the number of constitutionally troublesome conflicts cases. *Shaffer v. Heitner*⁴¹ and *Rush v. Savchuck*⁴² eliminated the possibility of territorial jurisdiction over nonresident defendants in cases which could not satisfy the minimum contacts test.⁴³ In so doing, they obviated the need for Supreme Court intervention which occurred in *Home Insurance Co. v. Dick*,⁴⁴ long regarded as one of the Court's most significant choice-of-law cases. The Court held there that Texas had no connection with the case capable of supporting its court's application of forum law. Minimum contacts were so lacking in *Dick* that today it would not last long enough on the docket for the choice-of-law issue to materialize.⁴⁵

On the other hand, new opportunities for courts to render constitutionally troublesome conflicts decisions probably appeared when *International Shoe Co. v. Washington*⁴⁶ created the possibility of personal jurisdiction over nonresident defendants when service of process could not be completed within the forum state.⁴⁷

40. A more precise discussion of what constitutional limits for conflicts decisions are or should be follows, *infra* notes 122-27 and accompanying text, and notes 128-65 and accompanying text.

41. 433 U.S. 186 (1977).

42. 444 U.S. 320 (1980).

43. Prior to *Shaffer*, the Court had confined the test to personal (in personam) jurisdiction—one of three types of territorial jurisdiction. The Court declared in *Shaffer* and *Rush* that minimum contacts applied to all assertions of territorial jurisdiction over nonresident defendants.

44. 281 U.S. 397 (1930). The Supreme Court relied on the decision in *Shutts*. 472 U.S. 797, 823 (1985).

45. "There would be no jurisdiction in the Texas Courts [sic] to entertain such a lawsuit today." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310 n.12 (1981) (plurality opinion).

A number of other cases in which the choice of forum law was troublesome, if not clearly unconstitutional, will not recur because they also circumvented the minimum contacts requirement in a manner thereafter expressly forbidden in *Rush*. E.g., *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978); *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), (as to defendant Warren), *cert. denied*, 414 U.S. 856 (1973). In each case, the federal diversity court sitting in New York was required by *Klaxon v. Stentor*, 313 U.S. 487 (1941), to react to the choice-of-law problem as a New York state court would. The Second Circuit reacted in both cases by applying New York law. The propriety of both results has been strongly criticized. *O'Connor*: Rosenberg, *A Comment on Neumeier*, 34 ARK. L. REV. 231, 240 (1980); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U.L. REV. 33, 101 (1978). *Rosenthal*: Kirgis, *supra* note 25, at 135-36 (1976); Martin, *Constitutional Limitations*, *supra* note 25, at 225-27 (1976); Reese, *Legislative Jurisdiction*, *supra* note 27, at 1605-06 (1978).

And, in at least two cases, *Hanson v. Denckla*, 357 U.S. 235 (1958) and *Rush v. Savchuck*, 444 U.S. 320 (1980), the Supreme Court averted constitutional confrontation over choice of law by holding that courts lacked territorial jurisdiction. See Shreve, *In Search of a Choice-of-Law Reviewing Standard—Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327, 334 (1982) [hereinafter cited as Shreve, *Hague*].

46. 326 U.S. 310 (1945).

47. On the significance of this development, see Hay, *Refining Personal Jurisdiction in the United States*, 35 INT'L. & COMP. L.Q. 32, 61 (1986); Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 590 (1958).

The period following *International Shoe* was marked by a proliferation of long-arm statutes and a generally permissive trend in due process regulation of personal jurisdiction. Choice-of-law-motivated forum shopping grew in proportion to the increase in the number of courts jurisdictionally competent to hear the same case.

The Supreme Court has since curtailed some of the more freewheeling assertions of personal jurisdiction which emerged from this period.⁴⁸ But several of the Court's recent decisions⁴⁹ make clear that its minimum contacts test continues to permit a choice of forums in many cases with multistate contacts. The forum may have sufficient minimum contacts to entertain jurisdiction in some cases yet lack a constitutional basis for applying its own law. For example, personal jurisdiction over nonresident defendant Allstate was unquestioned in *Hague*, even though the controversy arose out of state.⁵⁰ And there seems little doubt that Allstate's substantial—albeit unrelated—business activity in Minnesota would satisfy the minimum contacts standard recently applied in *Helicopteros Nacionales de Columbia v. Hall*.⁵¹ Yet several distinguished commentators have questioned the constitutionality of Minnesota's choice of its own law.⁵² This suggests something about the ultimate limitations of minimum contacts as a check on choice-of-law abuses. There is a clear difference between prejudice from forcing the defendant to defend where she does not wish to defend and the greater prejudice of binding the defendant with the forum's substantive law. The minimum contacts test is only concerned with the former.⁵³ Legitimate authority to force a defendant to defend in the forum does not and should not invariably connote authority for the forum to apply its own law.

The conclusion that a court may exercise territorial jurisdiction validly is likely to say even less about the court's competence to apply its own law in cases which are not subject to minimum contacts scrutiny. The Court has invoked the minimum contacts test only to protect *nonresident* defendants, and then only if they have neither

48. *Asahi Metal Industry Co. v. Superior Court*, 107 S. Ct. 1026 (1987); *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court of California*, 436 U.S. 84 (1978).

49. *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

50. It is not surprising that even the lone dissenter on the Minnesota Supreme Court and petitioner Allstate conceded jurisdiction. Shreve, *Hague*, *supra* note 45, at 334. Allstate did extensive business in Minnesota and "there was nothing to suggest that Allstate would undergo hardship or great inconvenience if forced to defend in Minnesota instead of the neighboring state of Wisconsin where the accident occurred." *Id.* at 335.

51. 466 U.S. 408 (1984). "Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation." *Id.* at 414.

52. See Hay, *Full Faith and Credit and Federalism in Choice of Law*, 34 MERCER L. REV. 709 (1983); Kozyris, *Reflections on Allstate — The Lessening of Due Process in Choice of Law*, 14 U.C.D. L. REV. 889 (1981); Reese, *The Hague Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195 (1981).

53. For a discussion of purposes underlying the minimum contacts test, see *supra* note 38. The difference between defendant's stake in the minimum-contacts question and the choice-of-law question seems even greater when one considers that the defendant may not be forced to defend on the merits in the forum selected by plaintiff, even if the forum has minimum contacts. Instead, defendant may be able to obtain a state-court dismissal or federal-court transfer on *forum non conveniens* grounds. *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174, 2185 & n.20 (1985). On the relationship between *forum non conveniens* and territorial jurisdiction, see Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103 (1971); Hazard, *Interstate Venue*, 74 NW. U.L. REV. 711 (1979); Morley, *Forum Non Conveniens: Restraining Long Arm Jurisdiction*, 68 NW. U.L. REV. 24 (1973).

expressly consented to jurisdiction nor cured the jurisdictional problem by their conduct in the case.

The most significant category of express consent cases involves situations in which a foreign corporation files a consent to jurisdiction with state authorities as a condition for doing business there. Depending on the wording of the consent statute, consent jurisdiction may be broad enough to cover causes of action arising outside the forum.⁵⁴ Personal jurisdiction in such cases suggests little about the authority of the forum to apply its own law.

In addition, personal jurisdiction throws little, if any, light on the choice-of-law process when it exists only because of the acquiescence or inadvertence of a nonresident defendant. For tactical reasons, the defendant may simply decline to question jurisdiction.⁵⁵ Or counsel may fumble the opportunity provided by the forum to challenge it.⁵⁶ Or a court may deem personal jurisdiction to exist as a sanction against a defendant's refusal to comply with an order compelling discovery of jurisdictional facts.⁵⁷ It would be unreasonable to suggest that in waiving minimum contacts protection,⁵⁸ the defendant also waives objection to the forum's substantive law.⁵⁹ Because these cases have not run the minimum contacts gauntlet, they are even more open to unjustified choice of forum law.⁶⁰

54. This practice seems unreasonable and has been criticized. Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 981-82 (1981); Walker, *Foreign Corporation Laws: A Current Account*, 47 N.C.L. REV. 733, 735-37 (1969). But, although the leading cases are rather old, *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) (opinion per Holmes, J.) and *Smolik v. Philadelphia & Reading Coal and Iron Co.*, 222 F. 148 (2d Cir. 1915) (opinion per L. Hand, J.), the practice still seems to have wide acceptance. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 44 and comment c (1971); E. SCOLES & P. HAY, *supra* note 4, at 332.

55. This may have happened in *Hague*. See *supra* note 50.

56. A few state jurisdictions retain the special appearance device, which requires the defendant to present separately her objection to the court's personal jurisdiction before taking any other action in the case. Federal courts and most state jurisdictions have dispensed with special appearances. R. CASAD, JURISDICTION IN CIVIL ACTIONS § 3.01 [5] [b] (1983 & Supp. 1986). This means that the defendant will not prejudice her jurisdictional attack by joining with it other grounds for dismissal. *E.g.*, Fed.R. Civ. P. 12 (g). But care must be taken, even in federal courts and the majority of states which have adopted the federal rules, because the defendant will waive her jurisdictional challenge if she either omits it from a motion to dismiss filed on other grounds, or fails to raise the matter by motion or pleading. Fed.R. Civ. P. 12 (b)(1).

57. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

58. "Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Id.* at 703.

59. See *supra* note 53 and accompanying text.

60. On the other hand, it is possible to imagine cases subject to the minimum contacts test in which the forum would be constitutionally capable of applying its own law yet without territorial jurisdiction.

Consider the following example. A, a citizen of Hawaii, travels to Detroit on business. A steps off a curb there and into the path of a car driven by B. A receives medical treatment in Detroit, returns to Hawaii and files suit against B there for his Detroit medical expenses relating to the accident. B is a citizen of Michigan, who has never been to Hawaii and has no interests there. His car is registered and insured in Michigan. Assume Michigan tort law, evincing a purpose of keeping state insurance premiums down by limiting the liability of the insured, would deny A recovery. Assume Hawaii tort law, reflecting the contrasting concern that injured parties be compensated, would permit A to recover.

Unless B somehow waives his challenge, the Hawaii court will not have jurisdiction over him. The forum state has no contacts with the defendant, related to the controversy or otherwise. The contact the forum has with the citizen plaintiff, A, cannot compensate for its lack of contact with the defendant, Hansen v. Denckla, 357 U.S. 235 (1958), and the case fails the minimum contacts test. If, however, the defendant appears but fails effectively to challenge the Hawaii court's personal jurisdiction, it seems clear that the court can thereafter constitutionally apply its own law. The most obvious beneficiaries of the compensatory concern backing Hawaii's prorecovery rule are plaintiff and other Hawaii citizens. Hawaii is quite interested in having its rule applied and B would hardly be surprised by its application. See *infra* notes 119-27 and accompanying text. For the opposing view that a forum unable to meet the minimum contacts standard necessarily lacks constitutional authority to apply its own law, see Martin, *Personal Jurisdiction*, *supra* note 36, at 875.

There are other restrictions on the reach of the minimum contacts test. The capacity of a forum to exercise personal jurisdiction over its own citizens is well established⁶¹ and functions more or less independently of minimum contacts.⁶² It is possible to imagine constitutionally troublesome conflicts results when courts exercise this kind of jurisdiction.⁶³ The same is true if courts can impose their jurisdiction through local service over nonresident defendants who happen to be passing through the forum state.⁶⁴ Finally, choice of law was deprived of the salutary effect of minimum contacts in another way by the *Shutts* case itself.

For forty years the Court had administered the minimum contacts test without deciding whether it had to be satisfied to establish jurisdiction over the claims of passive, nonresident members of a plaintiff class. By the time the *Shutts* Court addressed the issue, the future of small-claim class actions depended to a considerable extent on how it was resolved.⁶⁵ The Court took what seems to be the fairest and most sensible view in rejecting the minimum contacts test in this context.⁶⁶ But, in refusing

61. *E.g.*, *Milliken v. Meyer*, 311 U.S. 457 (1940).

62. While the Court in *International Shoe* quoted a case holding that personal jurisdiction existed because of the defendant's forum citizenship (*Milliken v. Meyer*, 311 U.S. 458, 463 (1940)) when offering its minimum contacts test, 326 U.S. 310, 316 (1945), it made no real attempt thereafter to subject jurisdiction-by-citizenship cases to minimum contacts scrutiny.

63. "[I]t may be permissible to sue the defendant at his domicile for a cause of action arising out of a tort in a distant state, but not reasonable to apply the law of the domicile to hold the defendant liable for conduct that the law of the other state required." R. WENSTRAUB, COMMENTARY, *supra* note 8, at 93. *But cf.* L. BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 269 (1986) [hereinafter cited as L. BRILMAYER, INTRODUCTION TO JURISDICTION] (reading *Skirotos v. Florida*, 313 U.S. 69 (1941), to suggest that forum citizenship plus some forum activity unrelated to the controversy may permit the forum constitutionally to apply its own law). In other cases, it may be unreasonable to apply the law of the domicile against a plaintiff electing to sue in the defendant's home state. *See, e.g.*, the discussion of *Lillianthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964), *infra* at notes 125-27 and accompanying text.

64. This is sometimes called transient jurisdiction. For examples, see *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959) (passenger served while airplane flew over the forum state) and the cases cited in E. SCOLES & P. HAY, *supra* note 4, at 264 n.6. This means of bypassing minimum contacts has been widely criticized, called by one commentator a "blot on American law." EHRENZWEIG, *supra* note 53, at 108. A number of authorities have suggested that the Supreme Court will eventually subject such cases to a minimum contacts standard, RESTATEMENT (SECOND) OF JUDGMENTS, Introduction, 25-26 (1982); KALO, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1191 (1978); VERNON, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 273, 302-303. But the Court has not yet done so.

65. In a series of federal procedural decisions, the Supreme Court rendered most small-claim class actions difficult if not impossible to maintain in federal court. *Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). For a discussion of developments during this period, see C. WRIGHT, *THE LAW OF FEDERAL COURTS* 481-85 (4th ed. 1983).

None of these decisions is controlling on state courts. However, a decision curtailing nationwide class actions on due process grounds obviously would be. Note in *Shutts*, for example, how few of the class members had contacts with the forum state, either through residence or through the subject matter of their claims. *See supra* note 13. Like *Shutts*, a large portion of virtually any nationwide class in state court would likely fail the minimum contacts test. The issue attracted considerable attention by the time of the *Shutts* decision. *See, e.g.*, KAMP, *The Multistate Consumer Class Action: Local Solutions, National problems*, 87 W.VA. L. REV. 271 (1985); Note, *Jurisdiction over Unnamed Plaintiffs in Multistate Class Actions*, 73 CALIF. L. REV. 181 (1985); Note, *Jurisdiction and Notice in Class Actions: "Playing Fair" with National Classes*, 132 U. PA. L. REV. 1487 (1984).

66. Urging application of the minimum contacts standard, petitioner argued that, because it is possible for nonresident class claimants to run the same risk as nonresident defendants of being bound by the proceeding, they should be protected by the same due process restraints on courts' personal jurisdiction. Moreover, the passive character of class membership—typically, class members take no action with reference to the suit prior to the class-wide adjudication—made it inappropriate to regard nonresident class members as having consented to the court's jurisdiction by presenting their claims for adjudication there. Brief For Petitioner, pp. 8-24.

Respondents' position was that the due process guarantees of notice and adequate representation, reflected in such cases as *Hansberry v. Lee*, 311 U.S. 32 (1940) and *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950),

to dispose of the case on territorial jurisdiction grounds, the Court again demonstrated the necessity of dealing directly with the choice-of-law process.

What emerges from this discussion is that the minimum contacts test only reduces conflicts abuses. Not all assertions of territorial jurisdiction are subject to it, and some constitutionally troublesome conflicts cases are likely to pass it. A need exists, then, for conflicts review to enforce even the relatively modest constitutional guarantees the Supreme Court has so far recognized. Should the Court expand the role of the Constitution in regulating choice of law, as I will recommend,⁶⁷ the inadequacy of minimum contacts as a surrogate for conflicts review will become even more pronounced.

V. THE DESIRABILITY OF RECASTING FORUM INTEREST AND OTHER CHOICE-OF-LAW POLICIES AS CONSTITUTIONAL DOCTRINE

Assuming a need for the Constitution to address directly the choice-of-law process, the reader might wonder whether interest analysis should be recast as a constitutional doctrine.⁶⁸ Should the Court attempt something more original? Perhaps not. The policies animating full faith and credit and due process review⁶⁹ also are central to modern conflicts theory. The *Restatement (Second) of Conflict of Laws*⁷⁰ and Professor Leflar's "Choice-Influencing Considerations"⁷¹ appear to dominate the latter.⁷² Each employs many policies,⁷³ but prominent in each are the

supplied a sufficient standard for measuring the fairness to class members of an adjudication of their state court claims. If these concerns were satisfied, no importance should be attached to the fact that contacts between the forum state and nonresident members of the class were so tenuous that due process would have prevented jurisdiction over the same persons had they been defendants. Small-stake claimants were less likely to be concerned over being bound by the proceeding since—unlike defendants—they want to litigate and they usually have little hope of having their claims heard elsewhere. Indeed, it would be ironic if dismissal of the case for failure to satisfy minimum contacts—for the supposed protection of the claimants—actually served to abort their only opportunity for recovery. Brief For Respondents, pp. 14–23.

The Court sided with respondents. It found provisions made by the Kansas courts sufficient to protect due process rights of the class to notice and an opportunity to participate. It ruled that "[b]ecause States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter." 472 U.S. 797, 811 (1985). For a discussion of the effect of personal jurisdiction aspects of *Shutts* on class actions, see Kennedy, *The Supreme Court Meets the Bride of Frankenstein*: Phillips Petroleum Co. v. Shutts and the Multistate Class Action, 34 U. KAN. L. REV. 255 (1985). For a discussion of the effect of the case on choice-of-law problems peculiar to class actions, see Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions*, 96 YALE L.J. 1 (1986); Note, *Choice of Law and the Multistate Class: Forum Interests in Matters Distant*, 134 U. PA. L. REV. 913 (1986).

67. See *infra* Part VII of this Article.

68. For a discussion of how, in the past, the meaning of interest has differed in each context, see *supra* note 29.

69. These two clauses continue to provide the bases for constitutional review of choice of law. See *supra* note 25.

70. (1971).

71. Described in R. LEFLAR, *AMERICAN CONFLICTS LAW* 205–19 (3d ed 1977) [hereinafter cited as R. LEFLAR, *AMERICAN CONFLICTS*]; Leflar, *Choice-Influencing Considerations in Conflicts Law*, N.Y.U.L. REV. 267 (1966) [hereinafter cited as Leflar, *Considerations*].

72. Professor Kay's illuminating study, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983), supports this conclusion, although, as she notes, it is difficult to get a hard count, since a court may refer to more than one approach in the same opinion. *Id.* at 572–73. The impact of the Leflar approach is strongest in torts. The influence of *Restatement (Second)* is strong in torts, greater in contracts, and frequently preeminent elsewhere, e.g., marriage, wills, trusts.

Many courts have been influenced by Professor Currie's general writings on conflicts, but his governmental interest methodology gained few judicial adherents. See Shreve, *Currie*, *supra* note 4. The same is true for the *lex fori* approach of Professor Ehrenzweig. A diminishing number of jurisdictions still use the territorial, or *lex loci* approach of the original *Restatement of Conflicts*. For further discussion of *lex fori* and the original *Restatement*, see *infra* note 163.

73. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* presents its "Choice of Law Principles" in Section 6 (2):

(a) the needs of the interstate and international systems,

forum's interest in applying its own law,⁷⁴ respect for laws of other, interested states⁷⁵ and protection of justified party expectations.⁷⁶ So fully do these policies also articulate the concerns of full faith and credit and due process that constitutional doctrine best applied under these clauses may not need to offer any genuinely new ideas.⁷⁷

The problem has been where to draw the line. The Supreme Court could nationalize the choice of law.⁷⁸ But this is something the Court clearly does not want

- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability, and uniformity of results, and
- (g) ease in the determination and application of the law to be applied.

Professor Leflar's considerations are (1) "Predictability of Results," R. LEFLAR, *AMERICAN CONFLICTS LAW*, *supra* note 71, at 205-07; (2) "Maintenance of Interstate and International Order," *id.* at 207-08; (3) "Simplification of the Judicial Task," *id.*, at 208-10; (4) "Advancement of the Forum's Governmental Interests," *id.* at 210-12; and (5) "Application of the Better Rule of Law," *id.* at 212-15.

74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b), *supra* note 73; Leflar's consideration (4), *supra* note 73.

75. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(c), *supra* note 73; Leflar's consideration (2), *supra* note 73.

76. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d), *supra* note 73; Leflar's consideration (1), *supra* note 73.

77. Compare the protection of justified expectations as a choice-of-law policy, *supra* note 76 and accompanying text, with the due process protection of justified expectations, *infra* note 135 and accompanying text. Compare the legitimacy of the forum's interest in applying its own law and the need for respect for the laws of other states as choice-of-law policies, *supra* notes 74-75 and accompanying text, with juxtaposition of the same interests under the full faith and credit clause, *supra* note 26. *But see* R. WEINTRAUB, COMMENTARY, *supra* note 8, at 550, who argues against an examination of countervailing state interests under the full faith and credit clause. Professor Weintraub's analysis seems to be a response to the suggestion that the full faith and credit clause may add nothing to the limitations imposed on conflicts decisions by the due process clause. *Id.* Like Professor Weintraub, I feel that the full faith and credit clause has something to add to conflicts review. But I respectfully disagree that it is necessary or desirable to abandon the prevailing conception that the clause should be administered by assessing forum and sister state interests. For the special role I would assign to the full faith and credit clause, see *infra* notes 150-53 and accompanying text.

I do not mean to suggest in the text accompanying this note that Restatement (Second) and Leflar's "Choice Influencing Considerations" administer in the same way or with equal effect the policies they share in common with the due process and full faith and credit clauses. Forum neutrality permeates the design of the Restatement (Second). It places the court in the role of having "no interest of its own to protect" and of "seeking only to apply the most appropriate law." Reese, *Conflict of Laws and the Restatement Second*, 28 *LAW & CONTEMP. PROBS.* 679, 692 (1963). Many of Professor Leflar's hypothetical applications of his approach also suggest forum restraint, see Leflar, *Considerations*, *supra* note 71, and Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 *CALIF. L. REV.* 1584 (1966), and he has maintained that "modern decisions, regardless of exact language, are substantially consistent with each other." R. LEFLAR, *AMERICAN CONFLICTS*, *supra* note 71, at 219. However, because the structure of Leflar's approach is more malleable than Restatement (Second), and because of his "Better Rule" wild card (consideration (5), *supra* note 73), his approach has become an easier means for courts to justify selection of their own law. See Shreve, *Hague*, *supra* note 45, at 342 n.81.

78. A number of commentators have suggested that the Supreme Court use its power to make federal common law to standardize much or all of American conflicts doctrine. Baxter, *Choice of Law and the Federal System*, 16 *STAN. L. REV.* 1 (1963); Horowitz, *Toward a Federal Common Law of Choice of Law: A Suggested Approach*, 14 *UCLA L. REV.* 1191 (1967); Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 *LAW & CONTEMP. PROBS.* 105 (1977). Professor Silberman recently offered a more restrained proposal. Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 *HOFSTRA L. REV.* 103 (1981). The Court's authority to make common law in this area cannot seriously be questioned. For a review of the numerous federal constitutional and statutory sources which would support preemption of the conflicts field by federal common law, see Shreve, *Hague*, *supra* note 45, at 337-38.

to do;⁷⁹ a view which is justified.⁸⁰ How, then, does the Supreme Court use for its constitutional reviewing doctrine the predominant norms of the choice-of-law process without slipping headlong into the process itself? This sobering question may explain why the Court went so long without reversing a conflicts decision prior to *Shutts*.⁸¹ But *Shutts* may provide a starting point for expanding constitutional restraints on conflicts abuse while maintaining necessary distance from the choice-of-law process. The case may provide a starting point for an approach more effectively delineating very bad conflicts cases from those which may be good or bad, depending on the critic's viewpoint, and for rectifying the former through manageable constitutional doctrine.⁸²

To suggest that the conflicts policy of protecting justified party expectations has a second, constitutional manifestation may not attract much argument. Concern that notice precede governmental action is a persistent theme in due process jurisprudence.⁸³ Interest analysis in choice of law and the full faith and credit clause also share a common theme.⁸⁴ Yet recasting interest analysis as constitutional law may be a more controversial idea.

Professor Brilmayer recently questioned the capacity of constitutional doctrine fashioned from interest analysis to exert any real control over choice of law.

[I]t would be difficult to imagine how the Supreme Court could ever contradict the state on its holding that there was an interest. After all, the state is the authoritative interpreter of state policy. The Supreme Court does not have jurisdiction to determine issues of state law. If interest is not more than a question of domestic statutory construction, then the Supreme Court would have no right to review a state court's finding that legislative jurisdiction did or did not exist.⁸⁵

79. See *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981). Justice Brennan refused to question Minnesota's choice-of-law approach or to suggest "whether we would make the same choice-of-law decision if sitting as a Minnesota Supreme Court." *Id.* at 307 (plurality opinion). Concurring, Justice Stevens was more direct: "It is not this Court's function to establish and impose upon state courts a federal choice-of-law rule . . ." *Id.* at 332.

The Supreme Court and other federal courts have been willing to make some nonconstitutional conflicts doctrine in federal question and admiralty cases. See, e.g., *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955).

80. Only a strictly neutral choice-of-law approach would be compatible with federal law sources which would underpin a federal common law of conflicts. See Shreve, *Hague*, *supra* note 45, at 343. Such an approach might be laudable, but it would be unlikely to succeed. "If the Supreme Court imposed a neutral, policy-centered choice-of-law methodology like the Second Restatement, it would face the dilemma of either undertaking a debilitating amount of superintendence through judicial review of state decisions or presiding over only the illusion of neutrality in the choice-of-law process." *Id.* at 344.

81. Professor Weintraub notes that *Shutts* is "the first case in thirty-eight years to declare a forum's application of its own law unconstitutional," citing *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586 (1947), as the prior case. R. WEINTRAUB, COMMENTARY, *supra* note 8, at 527.

82. For examples of the latter, see the cases discussed by the authorities *supra* at notes 8 and 9, and *infra* at notes 92 and 109. For this writer's attempt to categorize and treat the former, see *infra* notes 142-65 and accompanying text.

83. See Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 750 (1987). Due process thus protects genuine strangers to a prior proceeding from being bound by the judgment, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979), and gives even a party to the proceeding opportunity to attack the judgment on grounds of insufficient notice. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982); RESTATEMENT (SECOND) OF JUDGMENTS § 65 (1982).

84. See *supra* note 77.

85. Brilmayer, *Governmental Interest*, *supra* note 6, at 472. She directs her point against Currie, but it would seem to have application here. Cf. Kozmris, *Interest Analysis*, *supra* note 8, at 573 ("if each state is left free to determine what its interests are and where they lie, is not the logical consequence of interest analysis its own self-destruction as a choice of law theory since the issue then will become only a matter of the will and power of each state.").

This raises an interesting point with perhaps even larger implications. If state courts really were willing to revise settled interpretations of their statutes in order to make themselves interested, imagine the liberties they would take in reworking the purposes of common law rules of decision.⁸⁶ However, there are answers to the challenge. To begin with, it is doubtful whether a court often would be willing to skew the meaning and purpose of its local law, just to be able to apply it in the periodic multistate case.⁸⁷ In the rare instance where the court might do this, the result probably should stand free of constitutional intervention, if the matter seems within the forum's legislative jurisdiction.⁸⁸ Staying on the right side of the Constitution in conflicts decision making does not sound like the best of reasons for altering the content on one's substantive law. However, as Professor Brilmayer notes,⁸⁹ the quality of state laws and lawmaking is not in and of itself a proper concern of the Supreme Court. At the same time, a state court may not insulate its decision from Constitutional scrutiny by merely declaring itself interested, any more than it can screen any other federal question from the Supreme Court's view by characterizing it as one of state law.⁹⁰ *Shutts* demonstrates that the Court, having federalized the concept of interest for constitutional review, will not hesitate to reexamine interest questions and to reject the forum's conclusion that it is interested when the Court disagrees.

It is difficult to precisely separate interested from uninterested choices. But then there are few bright lines in other spheres of American constitutional doctrine.⁹¹ Close cases like *Hague* are bound to divide commentators⁹² and cloud constitutional doctrine.⁹³ But interest is not always a borderline issue. Interest supporting the application of forum law was clear in several cases.⁹⁴ Now *Shutts* has provided

86. Courts are usually more willing to adhere to stare decisis limitations set by their settled interpretation of status than to adhere to their common law precedents. See E. LEVI, AN INTRODUCTION TO LEGAL REASONING 23 (1948); and Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1243 n.180 (1986).

87. The primary impact and utility of just about any of the forum's substantive rules will be in purely domestic cases. See *infra* note 111 and accompanying text. When multistate cases do arise, more often than not they do not present complicated or close conflicts questions. See Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1594 n.37 (1978). The pressure on courts to distort local law to make themselves interested in conflicts cases is hence likely to be minimal.

88. See *infra* note 156.

89. Brilmayer, *Governmental Interest*, *supra* note 6, at 472 n.78.

90. See e.g., *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964). No other rule would satisfy the supremacy clause (U.S. CONST. art. VI, cl. 2). Redish, *supra* note 21, at 218.

91. See, e.g., *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981) (symposium with contributions by Meeks, Alexander, Benedict, Berger, Brest, Gerety, Grano, Kay, Maltz, Parker, Perry, Richards, Saphire, Soifer, Tushnet and Wellington).

92. The case sharply divided the conflicts community and generated a torrent of literature. E.g., *Conflicts Of Laws Theory After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 1 (1981) (symposium with contributions by Cavers, Weintraub, von Mehren & Trautman, Sedler, Silberman, Martin, Twerski, Davies, Reese, and Leflar); Hay, *supra* note 52; Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981); Shreve, *Hague*, *supra* note 45; Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982); *Choice of Law*, 14 U.C.D. L. REV. 837 (1981) (symposium with contributions by Lowenfeld & Silberman, Peterson, Kozyris, and Juenger).

93. See *supra* note 21.

94. E.g., *Pacific Employers Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Carroll v. Lanza*, 349 U.S. 408 (1955); *Nevada v. Hall*, 440 U.S. 410 (1979). In *Pacific Employers*, the Court said of California's interest in applying its workers' compensation statute, "[f]ew matters could be deemed more appropriately the concern of the state in which injury occurs or more completely within its power." 306 U.S. 493, 503 (1939). Arkansas' interests in availing a worker injured there of a more generous rule of recovery were "large and considerable" in the *Carroll* case. 349 U.S. 408, 413 (1955). The Court stated in *Hall* that the California forum's interest in applying its rule permitting recovery was

a contrapuntal example of a case clearly lacking in interest-generating contacts.⁹⁵

Dean Ely's critique of interest analysis poses a different challenge. If one accepts his remarkable suggestion that much of interest analysis itself may be constitutionally suspect,⁹⁶ it of course would be impossible to recast it as constitutional doctrine. Ely focused his attack on the interest-generating contacts of citizenship—when the fact that beneficiaries of a jurisdiction's rule are citizens makes the jurisdiction an interested source of law. That can mean, he correctly observed, that nonforum citizens will lose cases that forum citizens would have won. Ely suggested that this might violate the privileges and immunities clause,⁹⁷ which he argued “was plainly intended to prevent discrimination against out-of-staters”⁹⁸ Ely's spirited critique is quite imaginative and deserves more of a response from conflicts academe than it has received. Yet, one reading it may be left with the conclusion that Ely did not vanquish the considerable forces arrayed against him.⁹⁹

Ely noted but failed to refute successfully what seems to be the strongest argument against his position: To deprive nonforum citizens of forum law is not to give them less access to law than forum citizens enjoy. They simply have to direct their search for advantages to law of a different jurisdiction—their place of citizenship.¹⁰⁰ In most cases, it is difficult to see why they should enjoy the additional

the “substantial one of providing ‘full protection to those who are injured on its highways through the negligence of both residents and nonresidents.’ App. to Pet. for Cert. vii.” 440 U.S. 410, 424 (1979).

95. See *supra* notes 31–35 and accompanying text. For a helpful description of the process of weighing contacts to determine whether the forum or another jurisdiction is interested, see Richman, *Diagramming Conflicts: A Graphic Understanding of Interest Analysis*, 43 OHIO ST. L.J. 317 (1982).

96. *Supra* note 25, at 181–91.

97. U.S. CONST. art IV, § 2, not to be confused with the privileges and immunities clause of the fourteenth amendment § 1. To the extent that the latter has force, it limits state interference with rights of federal citizenship. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 423–26 (1978).

98. *Supra* note 25, at 181. At the same time, Dean Ely leaves some room for the conclusion that citizenship-based interest analysis may not violate the privileges and immunities clause, *id.* at 189–91. His criticism of the same as a choice-of-law factor is less qualified.

99. The list of those who Dean Ely cheerfully admits would be aligned against his constitutional interpretation of interest analysis, *supra* note 25, at 175–80, represents a kind of “who's who” of conflicts scholars. Ely also acknowledges that the Supreme Court expressed no interest in his privileges and immunities approach in *Hague*, *id.* at 187–88. The same was subsequently true in *Shutts*. *Supra* note 25 and accompanying text. Moreover, as Ely notes, the privileges and immunities cases from which he draws his theory are not altogether consistent. *Supra* note 25, at 182. Finally, the fact that corporations are beyond the protection of the clause, J. NOWAK, B. ROTUNDA & N. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 305 (3rd ed. 1986); Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 380 n.10 (1979), poses a significant problem in using it to regulate choice of law. True, the Court's distinction between natural persons and corporations in this context, e.g. *Blake v. McClung*, 172 U.S. 239 (1898), is troublesome. If the framers had been able to anticipate the phenomenal growth of corporations in the nineteenth century, perhaps they would have drafted art. IV, § 2 differently. Or the Supreme Court might have included corporations as “citizens of each state” if its settled interpretation of the point had come later. As it is, the Court would have to overrule several of its art. IV decisions to make the clause available to corporate litigants in conflicts cases. Interestingly, corporations (Home Insurance, Allstate, Shutts) have some of the best antidiscrimination arguments, as such arguments go.

100. “Most commentators,” notes Ely, would take the position that

[t]he system can be viewed not as one that flatly distinguishes locals from out-of-staters, but rather as one that ‘simply’ sorts people out according to the states from which they hail. Whether or not they are accorded benefits equivalent to those accorded by local law, therefore, will depend on what their local legislators have seen fit to do for them, and that, the argument would run, is not a violation of the Privileges and Immunities Clause.

Ely, *supra* note 25, at 185.

advantages of forum law. The laws of their places of citizenship may suggest why nonforum plaintiffs are entitled recovery¹⁰¹ or nonforum defendants to protection from liability.¹⁰² Unless, however, forum activity rather than citizenship creates the interest behind the forum's rule,¹⁰³ it is hard to see how the privileges and immunities clause requires the forum to override arrangements made elsewhere by out-of-state litigants by giving advantages they are denied under their home-state law.¹⁰⁴ Moreover, it is necessary to remember that nonforum litigants also have the relative *advantages* of their own law. Citizenship-based interest analysis makes it possible for nonforum citizens to win cases forum citizens would have lost.¹⁰⁵

VI. WHEN AND WHY ARE INTERESTED CHOICES CONSTITUTIONAL?

It may not follow from the Court's conclusion in *Shutts* that Kansas' lack of interest kept it from applying its own law that interested forums are always within the Constitution when applying their own law. There are at least two situations in which it is worth asking whether interest alone is enough. First, may an interested forum choose its law over the conflicting law of another place that has a superior interest in having its law applied? Second, may even an interested forum apply its law

101. Plaintiff's citizenship is a contact traditionally establishing the interest of a jurisdiction having a more generous rule of recovery based on the policy of compensation. *Infra* note 120 and accompanying text. There is special reason for a state to be concerned over the impact of physical or financial harm to its citizens and the effect on other citizens who look to such persons for support. Ultimately, compensation at less than the level provided by the state of claimant's citizenship increases the possibility that the claimants and their dependents will become financially dependent—and hence a drain—on that state. Plaintiff's state may or may not give force to this concern by creating law which promotes compensation. If it does, however, its interest in the application of that law in favor of one of its own is manifest—whenever suit is brought. *Cf.* Allstate Insurance Co. v. Hague, 449 U.S. 302, 319 (1981). Concluding that the contacts supporting the Minnesota courts' application of forum law included plaintiff's Minnesota citizenship and her Minnesota appointment as decedent's executor, the *Hague* plurality quoted with approval from the decision of the Minnesota Supreme Court: "Minnesota [has] an interest in respondent's recovery, an interest which the court below identified as full compensation for 'resident accident victims' to keep them 'off welfare rolls' and able 'to meet financial obligations.'" 289 N.W.2d at 49." *Id.* at 319.

102. The place of defendant's citizenship may have an interest in limiting defendant's liability wherever suit is brought. When insurance premiums are set statewide, a state may evince a proconsumer interest in lowering rates for its citizens by restricting recovery in accident cases, a possibility entertained in *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), and *Clark v. Clark*, 222 A.2d 205 (N.H. 1966). Or a state may have an interest in protecting a local contractor engaged in a public works project there from wide-ranging liability. *Casey v. Mason Construction & Engineering Co.*, 247 Or. 247, 428 P.2d 898 (1967).

103. If a jurisdiction's more generous rule of recovery derives from an interest in regulating activity, then occurrence of the activity in the forum generates interest and citizenship of the plaintiff is immaterial. *Cf.* *Fells v. Bowman*, 274 So.2d 109 (Miss. 1973) (Louisiana was interested in having its safety regulations applied to a Louisiana accident, but uninterested in having its rule of common-law negligence applied instead of Mississippi's rule of comparative negligence, since all the parties were from Mississippi); and *Pacific Employers Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939), discussed *supra* note 94.

104. Granted, in a case between a forum citizen and a noncitizen, the interest-generating contact of citizenship may communicate less warning to the noncitizen of the possibility of the application of forum law than contacts arising from the controversy—so little warning that a forum interested on the basis of litigant citizenship should in some cases be prevented by the Constitution from applying its own law. *See infra* notes 122–27 and accompanying text. But this is a due process rather than a privileges and immunities concern. *See infra* note 127 and accompanying text. And it can be addressed without Ely's wholesale rejection of citizen-based interest. *See infra* notes 122–27 and accompanying text.

105. For examples from six jurisdictions in which nonforum litigants used their citizenship to prevail over forum state opponents, see Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 Ohio St. L.J. 493, 499–501 (1985) [hereinafter cited as Weintraub, *Interest Analysis*], discussed further *infra* at note 109.

when to do so would frustrate a party's reasonable expectation that other, conflicting law would be applied?

For a while, the Supreme Court appeared to entertain the possibility that a forum might not be able to apply its law in a true conflict, if it would displace the law of another jurisdiction that would be more interested in having its law applied. The Court thus seemed to contemplate interest balancing as constitutional doctrine.¹⁰⁶ It since appears to have abandoned the idea,¹⁰⁷ and that is probably for the best. Much can be said for choice of the law of the more interested place as an aspect of American conflicts doctrine. But this form of interest analysis should not be recast as constitutional law.

While some commentators have questioned the device even at the choice-of-law level, interest balancing is well established.¹⁰⁸ It is at least arguable that principled

106. The Court suggested at least twice that, because the forum was not the less interested of two competing jurisdictions, it could apply its own law without violating the full faith and credit clause. *Alaska Packers Assoc. v. Industrial Accident Comm'n of California*, 294 U.S. 532, 549 (1935) ("... only if it appears that, in the conflict of interests which have found expression in the conflicting statutes, the interest of Alaska is superior to that of California, is there rational basis for denying to the courts of California the right to apply the laws of their own state."). *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 73 (1954) ("Of course Massachusetts also has some interest in the policy sued on in this case. . . . But plainly these interests cannot outweigh the interest of Louisiana in taking care of those injured in Louisiana."). Writing on *Watson*, one commentator stated that "the clear implication is that the full faith and credit clause would come into play if the forum state's interests were outweighed by the other state's interests." W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* 354 (8th ed. 1984).

107. "The plurality in *Allstate* noted that a particular set of facts giving rise to litigation could justify, constitutionally, the application of more than one jurisdiction's laws." *Shutts*, 472 U.S. 797, 818 (1985). The Court observed earlier in *Richards v. United States*:

When more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.

369 U.S. 1, 15 (1962).

108. Interest balancing has its shortcomings, but perhaps they have been overstated.

Currie argued against resolution of true conflicts by interest balancing, even at the choice-of-law level. Arguing that courts lacked the capacity to make such distinctions, he thought the interested forum should apply its own law. B. CURRIE, *SELECTED ESSAYS*, *supra* note 2, at 184. Consistent with this, he argued that the interested forum's application of its law was constitutional. *Id.* at 117. True, ranking competing state interests is taxing judicial labor. But the problem of determining which place is more interested does not differ in kind from that of deciding whether each place is interested at all. The latter also can be quite demanding. See *supra* notes 91-93 and accompanying text. Currie's suggestion that courts are up to that task but unable to appreciate degrees of interest seems inconsistent. Courts appear capable of both functions. Compare, e.g., *Babcock v. Jackson*, a false-conflict case described *supra* note 5, with *Southern International Sales Co. v. Potter & Blumfield Division of AMF, Inc.*, 410 F. Supp. 1339 (S.D.N.Y. 1976). In *Potter*, the question was whether to uphold a clause in a contract permitting termination without cause. The clause was valid under Indiana law but not under the law of Puerto Rico. The court noted that the contract contained a provision referring questions concerning the contract to Indiana law. It entertained the possibility that Indiana was interested in having its law upholding the termination clause apply, but the court applied Puerto Rico law to invalidate it. The court based its decision on § 187 of Restatement (Second), which it said "fit squarely" with the case. In pertinent part, the Restatement language quoted by the court rejects choice of law by contract when enforcement [1] "would be contrary to a fundamental policy of a state [here Puerto Rico], [2] which has a materially greater interest than the chosen state in the determination of the particular issue . . .", [3] so long as that state would have provided the source for governing law if the contract had contained no choice-of-law provision (§ 187 (2)(b)). Indiana may have been interested, but Puerto Rico was more interested.

Interest balancing will be most useful in cases in which the policies supporting the competing rules are well defined. When policies are obscure, the technique becomes speculative and unreliable. See Brilmayer, *Governmental Interest*, *supra* note 6, at 462-65. But, as Professor Weintraub recently observed, analytic difficulties in determining what policies underlie laws in the conflicts setting are not unlike those encountered in purely domestic cases. Weintraub, *Interest Analysis*, *supra* note 105, at 494.

In many cases, courts have been able to ease the difficulty of interest balancing by making their choices in part by interest analysis and in part by selecting law most likely to conform to party expectations. For example, both *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721 (1978), and *Casey v. Manson Constr. & Eng'r Co.*, 247 Or. 274, 428 P.2d 898 (1967), combined these factors to resolve true conflicts against selection of forum law.

and intelligent use of interest balancing can separate good from bad choice-of-law decisions.¹⁰⁹ For at least two reasons, however, interest balancing should not be constitutionally required.

First, the justification for an interested court to refuse to apply the law of a more interested place may not be entirely lacking. As Justice Stevens observed in *Hague*, forum law may be the only law familiar to the court. It may be the only law that the court has time or library resources to understand.¹¹⁰ Because state judges spend most of their time deciding purely domestic cases, they develop an intimate relationship with forum law.¹¹¹ The choices these judges make in conflicts cases periodically appearing on their dockets will be influenced by their starting point, which is likely to be forum law—less from chauvinistic impulse than from an understandable and perhaps inevitable institutional reflex. This sympathetic interpretation of the process leading to the forum's choice of its own law cannot justify selection of uninterested law.¹¹² But it does reduce the gravamen of the court's refusal to apply the law of a more interested place.

Second, desirable as results reached through careful interest balancing might be, it would be disastrous for the Supreme Court to require it under the Constitution. Whatever the choice in most true conflict decisions, the losing side could frame the federal constitutional issue that its rule came from a more interested place.¹¹³ The problem the Court would make for itself would be the same as if it created a strictly neutral federal common law of conflicts.¹¹⁴ The number of cases encompassed by the new standard would be overwhelming.¹¹⁵ Since the Court's resources are already

109. For example, the device can keep courts using the policy-centered approach of interest analysis, *supra* note 3, from dwelling excessively on the policies supporting forum law. Professor Weintraub recently discussed cases from Oregon, Wisconsin, Minnesota, Pennsylvania, and New York, in which interest balancing assisted courts in choosing the law of another place even though the forum was interested in having its own conflicting law applied. Weintraub, *Interest Analysis*, *supra* note 105, at 499–501. At the same time, particular results in many interest-balancing cases seem capable of sparking intractable disagreement among commentators. For example, the correctness of the decision in *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970), was debated at length in *Cipolla v. Shaposka—An Application of "Interest Analysis"*, 9 DUQ. L. REV. 347 (1971) (symposium with contributions by Cavers, Ehrenzweig, Felix, Pelaez, Peterson, Sedler, Seidelson, and Twerski). Application of the interest-balancing standard—like that of respecting the justified expectations of the parties—thus will not always lead to broad agreement as to whether a judicial decision is good or bad.

110. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 326 n.14 (1981) (Stevens, J., concurring).

111. See B. CURRIE, *SELECTED ESSAYS*, *supra* note 2, at 82; von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 *Cornell L. Rev.* 927, 942 (1975).

112. *Infra* notes 163–64 and accompanying text.

113. The problem of coming up with convincing results through interest balancing when policies supporting competing rules are unclear, see *supra* note 108, and the controversy surrounding particular applications of the technique, see *supra* note 109, create this possibility.

114. See *supra* note 78–80 and accompanying text.

115. It is tempting to think that the Court could reduce the problem by narrowing the rule, saying, for example, that only cases displacing the conflicting law of a *greatly* more interested place violated the Constitution. Once I suggested this. Shreve, *Hague*, *supra* note 45, at 345. On further reflection, however, it does not seem likely that the distinction between "more interested" and "greatly more interested" could serve as an intelligible reviewing standard. This is in part because of the possible opacity of interest balancing, *supra* note 103, and in part because the results in cases in which interest balancing figures also may be influenced to varying degrees by a choice-of-law policy against frustrating justified party expectations. *Id.*

strained,¹¹⁶ it is safe to conclude that it would be neither willing¹¹⁷ nor able to take on a horde of cases from the conflicts mainstream.

One situation, however, where the interest should not justify the application of forum law is in cases in which the choice would clearly frustrate the reasonable expectations of a party. The *Shutts* Court did not say that forum interest would always entitle a court to apply its own law. On the other hand, its approach did not really seem to allow for the possibility that it would not. The Court noted the special function of the Constitution in protecting against conflicts results which unfairly surprise the parties. But it seemed to assume, without saying so, that if the forum has contacts sufficient to make it interested, these same contacts should have caused the party aggrieved by forum law to foresee at least the possibility that forum law would govern.¹¹⁸ A reading of conflicts decisions suggests that this will not always be true.

Perhaps the most common type of interest setting up the forum's half of a true conflict is that based on the citizenship of one of the parties.¹¹⁹ For example, the plaintiff in a typical tort case is a forum citizen seeking the benefit of the forum's prorecovery rule, which is bottomed on a policy of compensating injured persons. The forum derives interest from the fact that the most appropriate beneficiaries of that policy are the plaintiff and other citizens of the forum state.¹²⁰ The earlier frustration felt by courts over their inability to utilize their own law in such cases probably contributed more than anything else to the weakening and eventual overthrow of the place-of-wrong rule of the original Restatement of Conflicts in most jurisdictions and its replacement by some form of interest analysis.¹²¹

But the interest-generating contact of citizenship probably communicates less warning about the choice-of-law implications of the case than contacts arising from the controversy.¹²² It may communicate so little warning that a forum interested on the basis of party citizenship should not be permitted to apply its own law. Two true-conflict cases offer examples. In *Blamey v. Brown*,¹²³ the Minnesota Supreme

116. The Supreme Court has trouble even keeping up with lower federal court decisions. It "is no longer capable of providing the supervision of federal judicial lawmaking that it once provided." Carrington, *Crowded Dockets and the Courts of Appeals: Threat to the Function of Review and National Law*, 82 HARV. L. REV. 542 (1969). For more on the limited availability of Supreme Court review, see P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 209 (1976); Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335 (1975).

117. See *supra* note 79.

118. Note how the Court links its interest requirement, *supra* notes 28–34 and accompanying text, with its "expectation of the parties" point and language it quotes from *Home Insurance Co. v. Dick* to deny Kansas authority to "abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Supra* note 35 and accompanying text.

119. The forum state will at times be interested in benefiting the citizen-defendant with forum law. See *supra* note 102. More often the plaintiff is the citizen-beneficiary. See *supra* note 101 and *infra* note 120 and accompanying text.

120. *Supra* note 101. Cases recognizing this form of interest include *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), described *supra*, at note 5; and *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519.

121. See Judge Kenison's excellent overview in *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); and, generally, Alexander, *The Concept of Function and the Basis of Regulatory Interest Under Functional Choice of Law Theory: The Significance of Benefit and the Insignificance of Intention*, 65 VA. L. REV. 1063 (1979); Powers, *Formalism and Nonformalism in Choice-of-Law Methodology*, 52 WASH. L. REV. 27 (1976). On the decline of the place-of-wrong rule, see *infra* note 163.

122. For examples of the latter, see *supra* note 103.

123. 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

Court applied its law permitting dram-shop recovery in favor of a Minnesota plaintiff. It did so even though the third person whose intoxication caused the plaintiff's injury was served in the defendant's Wisconsin tavern under circumstances that the court acknowledged to be insufficient to warn the defendant of the possible application of Minnesota law.¹²⁴ In *Lillenthal v. Kaufman*,¹²⁵ the Oregon Supreme Court applied its spendthrift law to insulate an Oregon defendant from liability on notes he executed and delivered in California to the California plaintiff. The circumstances of the case would not have led the plaintiff to anticipate the possibility that any law would apply other than that of California—which upheld the obligation.¹²⁶ The forum was clearly interested in both cases. Yet a strong argument can be made in both cases that the application of forum law so frustrated the reasonable expectations of the nonforum litigant as to violate due process.¹²⁷

VII. WHEN AND WHY UNINTERESTED CHOICES SHOULD VIOLATE THE CONSTITUTION: A PROPOSAL

The analysis and holding in *Shutts* seem to reflect the following rule: When a forum's substantive law is unsupported by interest, the forum may not apply it to frustrate a party's reasonable expectation that it would enjoy application of conflicting nonforum law.¹²⁸ Considering that the Constitution would probably prevent even *interested* forums from unreasonably surprising litigants by applying forum law,¹²⁹ the dependent clause of this rule seems pointless.¹³⁰ After thirty-eight years¹³¹ and numerous intervening cases permitting courts to favor their own law,¹³² the Court demonstrated in *Shutts* that it was still possible to exceed the Constitution. It is fair to ask whether the case has greater significance.

It does. First, it adds to the law in certain small respects. A number of constitutional cases have demonstrated how interest can supply a forum's constitu-

124. [D]efendant failed to procure liquor liability insurance since he assumed that only the laws of Wisconsin created his liability. These laws impose no liability upon him in the present case and thus if Minnesota law is applied some injustice will result to the defendant since the legal ramifications of his actions were not predictable to him at the time he acted.

Id. at 891.

125. 239 Or. 1, 395 P.2d 543 (1964).

126. The defendant went to San Francisco to ask the plaintiff, a California resident, for money for the defendant's venture. The money was loaned to defendant in San Francisco, and by the terms of the note, it was to be repaid to the plaintiff in San Francisco.

Id. at 545-46. "The plaintiff clearly made the loan in ignorance both of the Oregon statute and of the defendant's spendthrift status." Reese, *Legislative Jurisdiction*, *supra* note 27, at 1597.

127. Regarding *Blamey*, see Shreve, *Hague*, *supra* note 45, at 353-54. Regarding *Lillianthal*, see Reese, *Legislative Jurisdiction*, *supra* note 27, at 1597.

128. A review of the Court's analysis appears *supra*, at notes 29-35 and accompanying text.

129. See *supra* notes 118-27 and accompanying text.

130. A forum interest requirement in this context would be at best a crude and not altogether reliable measure of when a party's expectation of a different law choice was reasonable. The idea would be that the forum's interest-generating contacts would give warning of the possibility that forum law would govern. However, at least when interest is based on litigant citizenship, this assumption may not be borne out. *Id.*

131. *Supra* note 81.

132. *E.g.*, *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981); *Nevada v. Hall*, 440 U.S. 410 (1979); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954).

tional justification for applying its law.¹³³ As the first case to use interest analysis in striking down a conflicts decision, *Shutts* provides a counterweight: demonstrating when and how forum contacts fall short of creating interest.¹³⁴ Also, the *Shutts* Court responded to suggestions that it make its constitutional doctrine more pragmatic, linking a party-expectations rationale to its famous invalidation of Texas' choice of its own law in *Home Insurance Co. v. Dick*.¹³⁵ *Shutts*, however, may eventually prove less significant for the points it settles than for its role in preparing the way for more significant developments in reviewing doctrine.

Several aspects of the case can serve as building blocks. First, the position of the Court prior to *Shutts* was understood both by those who liked it¹³⁶ and those who did not¹³⁷ to be that a forum could constitutionally apply its own law if it were interested in the choice of law sense or if it had other contacts with the case. *Shutts* disregarded contacts incapable of supporting the former.¹³⁸ Second, whether or not the facts required the court to do so,¹³⁹ it gave some indication that interest in the narrower sense might be (or at least might become) a prerequisite for the application of forum law.¹⁴⁰ Third, *Shutts* invoked both the full faith and credit and due process clauses simultaneously in its interest analysis.¹⁴¹ The balance of the Article will consider the kind of doctrinal structure that can and should be erected on this foundation.

I offer the following proposal: The Supreme Court should ban all disinterested applications of forum law, whether or not they frustrate party expectations¹⁴²—so long as conflicting law is that of an interested state.¹⁴³

If the *Shutts* Court had accepted Justice Stevens' view that the Kansas conflicts decision should be weighed separately under the due process and full faith and credit

133. See *supra* note 94 and accompanying text.

134. See *supra* note 95 and accompanying text.

135. On the *Shutts* Court's linkage of the party-expectations idea with *Home Ins. Co. v. Dick*, see *supra* note 118. The *Dick* case itself does not offer so pragmatic a conception of due process. Cf. R. WEINTRAUB, COMMENTARY, *supra* note 8 at 522 (referring to the 1930 decision as "not . . . greatly emancipated from the rigid, territorial conceptualism" of earlier precedent). For earlier suggestions that *Dick* should be read to protect against unfair surprise, see Stevens, J., concurring in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 326 (1981); and Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 455 (1959).

136. E.g., Sedler, *supra* note 11, at 488-89.

137. E.g., Ely, *supra* note 25, at 180.

138. The Court thus held that, while the relationship of the court to the class claims was sufficient to support jurisdiction, it did not provide a constitutional basis for applying Kansas law. 472 U.S. 797, 821 (1985).

139. See *supra* notes 129-30 and accompanying text.

140. The Court certainly resorted more fully than before to interest analysis as understood in contemporary choice of law. See *supra* notes 29 and 138 and accompanying text.

141. See *supra* notes 23-25 and accompanying text. The relation between interest and full faith and credit may be obvious, see *infra* notes 152-53 and accompanying text, but it may be significant that the Court also tied interest to due process. The specific connection made by the Court between interest and the due process concern of party expectations was unsuccessful. *Supra* notes 129-30 and accompanying text. But, by linking interest with due process, the Court opened the way for consideration of a different more subtle due process concern which is raised by interest analysis. *Infra* notes 155-60 and accompanying text.

142. An interest requirement is not entirely responsive to party-expectation concerns, anyway. *Supra* note 130. A constitutional rule protecting parties from unfair surprise in choice of law should stand apart from interest analysis, viz, it should apply whether application of forum law is or is not supported by interest. See *supra* text accompanying note 129.

143. *Shutts* did not seem to reach the question whether Texas, Oklahoma and Louisiana were interested in having their laws applied. It noted the argument that the laws of these places might pose "false conflicts," 472 U.S. 797, 818 (1985). But, from the context of this observation, it seems more likely that the Court meant to suggest by false conflicts the possibility that the laws might lead to the same result. This was clearly the meaning Justice Stevens intended for the term in his dissent. *Id.* at 838 & n.20. On the two meanings of false conflicts, see *supra* note 5 and accompanying text.

clauses,¹⁴⁴ it would have made this proposal more difficult to entertain. Justice Stevens was correct in suggesting that the two clauses advance different policies in conflicts review; that full faith and credit addresses “the interests of other sovereign States” and due process addresses “the fairness of[the] decision to the litigants.”¹⁴⁵ It might be that a forum-favoring conflicts decision could fail a test limited to due process only if it frustrated party expectations.¹⁴⁶ Perhaps the only way such a decision could fail a test limited to full faith and credit would be if it frustrated in some self-serving, parochial way a strong—perhaps fundamental¹⁴⁷—interest another state had in having its law applied.¹⁴⁸ My proposal goes beyond current law, since freestanding applications of either the due process or full faith and credit clauses alone may not support it. When neither clause would suffice alone, the proposal adds a further justification for Supreme Court intervention by using the combined weight of more subdued due process and full faith and credit concerns.

Results under this proposed rule would not be as easy to justify as the result in *Shutts*. The question there—who should bear the consequences of the courts’ disinterested choice of its own law—was easy to answer. The Kansas courts should bear the burden because there was little if anything behind their choice (Kansas was uninterested), and the defendant would have to pay a large price (unfair surprise¹⁴⁹) for the choice to be upheld. Absent frustrated expectation, harm from the disinterested application of forum law is less palpable. But it should be regarded as real enough to implicate both full faith and credit and due process concerns.

The full faith and credit clause makes clear that the sovereign interests of a state extend beyond its territorial limits. It is true that a forum does not have to follow the conflicting law of another state just because that state is interested, or even more interested than the forum.¹⁵⁰ But a forum should not frustrate the policy of a sister state if it can help it. It does just that by interposing its substantive¹⁵¹ law when

144. 472 U.S. 797, 824 (1985).

145. *Id.* He made the same points concurring in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 320 (1981).

146. This appears to be Justice Stevens’ understanding of the test. 472 U.S. 797, 837 (1985).

147. On the distinction between mere interest and fundamental interest, see the discussion of the *Potter* case, *supra* note 108.

148. See the statement of full faith and credit policy quoted from the Court’s opinion in *Shutts*, *supra* note 26. *Cf.* Justice Stevens dissenting in *Shutts*:

If, for example, a Texas oil company or a Texas royalty owner with an interest in a Texas lease were treated directly contrary to a stated policy of the State of Texas by a Kansas court through some honest blunder, the Constitution might bar such “parochial entrenchment” on Texas interests.

472 U.S. 797, 836 (1985) (quoting from *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion)).

This standard is noticeably obscure. Difficult as it has been in conflicts cases to secure due process’ party fairness guarantee by administering a reasonable expectation standard, *see* L. BRILMAYER, INTRODUCTION TO JURISDICTION, *supra* note 63, at 275–76, the process of stating and applying an intelligible standard for advancing full faith and credit’s policy of protecting sister-state sovereignty has proven far more difficult. Compare L. BRILMAYER, *id.* at 281 (suggesting “full faith and credit no longer has any independent vitality in choice of law.”) with R. WENTRAUB, COMMENTARY, *supra* note 8, at 550–57 (arguing an independent function for full faith and credit). It may be easier to implement full faith and credit policy if the clause does not have to bear the entire weight of a decision invalidating conflicts abuse. See discussion of the rule proposed by this Article, *infra* notes 150–53 and accompanying text.

149. If stark and prejudicial enough, it is a *per se* violation of the due process clause. *Supra* note 118.

150. *See supra* notes 106–17 and accompanying text.

151. I do not suggest, of course, that the forum is without authority to apply its own procedural law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971).

advancing no policy of its own. Application of forum law in such cases is not only bad choice of law. It is also a gratuitous lack of cooperation, an "entrenchment"¹⁵² on the interests of a sister state. This may not be a violation of the freestanding full faith and credit clause. But there is nothing in the text or history of the clause to suggest that it is not malleable enough to offer partial support for the conclusion that such choices are invalid.¹⁵³

The structure of my argument under the due process clause is much the same. Denying a litigant enjoyment of the law of the only interested place may not violate the freestanding due process clause.¹⁵⁴ But it does raise due process concerns. Here it is necessary to accept the idea that fundamental party fairness underlying due process takes in more than protection of justified party expectations. Consider the example of a purely domestic automobile accident case. That is, the citizenship of all the parties, the place where the defendant insured and registered his car, the situs of the accident, and the place of the plaintiff's medical treatment are all in the forum. Assume that the forum's guest passenger statute confers a case-winning advantage on the defendant.¹⁵⁵ Defendant gets the benefit of the statute because the place of suit has exercised its legislative jurisdiction to so regulate the controversy.¹⁵⁶ All contacts are with the forum and that place is interested in applying its rule,¹⁵⁷ although the application of forum law is so obvious that the matter of interest will probably be gainsaid. To deprive the defendant of the rule might not frustrate his expectations.¹⁵⁸ But it certainly would deny him fairness to which a party is entitled, since the defendant is an intended beneficiary of the case-winning rule and the facts put the case within the rational compass of that rule and no other.¹⁵⁹ If this very case was adjudicated in another jurisdiction,¹⁶⁰ the defendant would be treated just as unfairly if that disinterested court applied its conflicting law facilitating plaintiff's recovery

152. See *supra* note 148.

153. The full faith and credit clause traditionally has been more coercive regarding interstate recognition and enforcement of judgments, e.g., *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935). But nothing in the language of the clause appears to restrict its increased use in regulating choice of law.

154. Perhaps it does. See *infra* note 167 and accompanying text. But I will assume for this point in the discussion that it does not.

155. These statutes typically insulate drivers from liability to their noncommercial passengers, absent wanton behavior or gross negligence. Examples may be found in *Babcock*, *supra* note 5; *Dym*, *supra* note 9; *Tooker and Clark*, *supra* note 120.

156. Legislative jurisdiction "has to do with whether the state, through its courts or otherwise, has power to act upon the matter in issue by using the state's rules of law to regulate or control it." R. LEFLAR, *AMERICAN CONFLICTS*, *supra* note 71, at 4 (emphasis in original).

157. If the forum's guest-passenger statute has the proconsumer purpose of keeping local insurance rates down, the contacts establishing the forum's interest will be that the car was registered and insured in the forum. The remaining forum contacts enumerated above have only indirect significance. Because all contacts are with the forum, the case provides no colorable basis for establishing the interest of a state having a rule of recovery more favorable to the plaintiff.

158. "Predictability of legal results in advance of the event is largely irrelevant, since automobile accidents are not planned." *Clark v. Clark*, 222 A.2d 205, 209 (N.H. 1966).

159. See *supra* note 157. The Supreme Court has decided that a cause of action is within the property protection of the due process clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). It stands to reason that loss of the opportunity to resist a cause of action is a property interest similarly protected. See Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U.L. REV. 383, 397-98 (1983).

160. This could happen. It is possible under a variety of circumstances for a forum to exercise territorial jurisdiction over a case without having contacts making it interested in applying its own substantive law. See *supra* notes 50-65 and accompanying text.

instead of the guest-passenger statute of the defendant's home state. When a disinterested court denies a litigant access to the conflicting law of an interested place, it creates a sufficient problem of party fairness to enlist partial due process support for invalidating the decision.

The proposal would enlarge the scope of constitutional review for decisions under all choice-of-law approaches. Jurisdictions using interest analysis in their decisions¹⁶¹ would be unable to screen violations of the rule with bogus assertions of forum interest.¹⁶² Jurisdictions heretofore resolving conflicts without benefit of interest analysis¹⁶³ would have to add enough interest analysis to their approaches to avert violations of the rule.¹⁶⁴ This would force courts still following the original

161. See the discussion of the Restatement (Second) of Conflicts and Professor Leflar's "Choice-Influencing Considerations" *supra*, notes 73-75 and accompanying text.

162. *Shuts* illustrates how the rule would work in the first category. The Kansas Supreme Court maintained that the case provided contacts making Kansas interested in applying its law. Having federalized the concept of interest for constitutional review, the Court simply reexamined the interest question and concluded that Kansas was uninterested. *Supra* notes 28-34 and accompanying text. *Shuts*, of course, did not have to go as far as the Court would be able to under my proposal, because it found an "expectation of the parties" problem in the case. See *supra* note 118 and note 149 and accompanying text.

163. Interest analysis is not universally accepted in American choice of law. Under the *lex fori* approach, a court may not need to justify its choice of substantive forum law through interest analysis. And *lex loci* does not permit choice of any law through interest analysis.

Lex fori was formulated by Professor Ehrenzweig. See, e.g., Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach"*, 18 OKLA. L. REV. 340 (1965). He did not have a very high opinion of interest analysis, preferring to apply the forum's substantive law whenever possible. Ehrenzweig described a number of situations which he felt justified the presumptive application of forum law. See E. SCOLES & P. HAY, *supra* note 4, at 20-23. Professor Kay notes two jurisdictions, Kentucky and Michigan, that reflect *lex loci* characteristics in at least some of their decisions. *Supra* note 72, at 579-81. And the Kansas Supreme Court's decision in *Shuts* appears to have a *lex loci* dimension as well. The Kansas court claimed that it was easier for it to apply its own substantive law because the case was a nation-wide class action. "[T]he law of the forum should be applied," it held, "unless compelling reasons exist for applying a different law." 679 P.2d 1159, 1181 (1984). By subordinating a more probing interest inquiry to policies of local judicial administration, the Kansas Supreme Court placed its *Shuts* decision at least partly in the *lex fori* column. See Pielemeier, *Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation*, 133 U. PA. L. REV. 381, 400 n.127 (1985). At the same time, the national impact of *lex fori* has never been great, and it is not likely to thrive after *Shuts*. See *infra* note 164.

The *lex loci* (place-of-wrong) approach of the original Restatement of Conflicts has no mechanism for recognizing interests supporting nonforum law. Except in extreme cases, it is also indifferent to interests supporting forum law. The rule requires application of the law of the place where the last event necessary to create the cause of action occurred. Since the fact of injury follows facts suggesting liability in torts cases, law from the place where the claimant suffered the wrong controls. The rule is mechanical and indifferent to whether places from which ostensibly conflicting rules are taken would be interested in their application. Interest plays a role only in the inchoate sense that a *lex loci* forum could refuse to apply the law of a foreign place of the wrong, when the law of that place sufficiently offended the public policy of the forum state. See Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956). The place-of-wrong test is no longer the universal rule, or even the majority rule in American conflicts doctrine. But it survives in a number of jurisdictions. Professor Weintraub notes eleven states that have authoritatively reaffirmed it from the 1960s (Alabama, Connecticut, Delaware, Georgia, Kansas, Maryland, Nebraska, New Mexico, North Carolina, Tennessee, and Virginia). R. WEINTRAUB, COMMENTARY, *supra* note 8, at 323 n.66. The Connecticut Supreme Court recently refused to apply the rule in an accident case, O'Connor v. O'Connor, 201 Conn. 632, 519 A.2d 13 (1986). On the other hand, lower Indiana court's adhere to the place-of-wrong rule because of old Indiana Supreme Court precedent. Hubbard Mfg. Co. v. Greeson, 487 N.E.2d 825, 827 (Ind. Ct. App. 1986); Snow v. Bayne, 449 N.E.2d 296, 298 (Ind. Ct. App. 1983) (both following the Indiana Supreme Court's decision in Louisville & N.R. Co. v. Revlett, 224 Ind. 313, 65 N.E.2d 731 (1946)). Overall, however, "the great majority of courts that have been asked to reconsider the place-of-wrong rule in the light of interest analysis argument have elected to displace the old rule." R. WEINTRAUB, COMMENTARY, *supra* note 8, at 323. See generally Kay, *supra* note 72.

164. *Shuts* also suggests how the proposed rule would work in the second category. *Lex fori* is a category-two approach. *Supra* note 164. The Kansas Supreme Court seemed to make a kind of *lex fori* argument for the forum's substantive law, that the interest concerns could be subordinated to the special demands and adjudicative opportunities of a nation-wide class action. *Id.* The United States Supreme Court dismissed this argument, 472 U.S. 797, 822-23 (1985).

Restatement's place-of-wrong rule to abandon it in some cases.¹⁶⁵ At the same time, the proposal does not represent a frontal assault on the place-of-wrong rule. It simply means that, in some cases, courts will no longer be able to resolve conflicts with the rank indifference to policies underlying competing laws countenanced by the original Restatement.¹⁶⁶

I have resisted the temptation to broaden the proposal into a flat rule against choice of any law unsupported by interest over conflicting law of any interested jurisdiction. This is tempting because the rule would then curb place-of-wrong applications when an *interested* forum denies its citizens the benefit of forum law.¹⁶⁷ Given the characteristic lack of discussion in *lex loci* opinions of the policies underlying conflicting laws, it is difficult to determine from a reading of the cases

It remanded the case to the Kansas Supreme Court with directions that the Kansas Court examine more closely 'putative conflicts' with Texas, Louisiana, and Oklahoma law under the correct constitutional standard. *Id.* True, what the Court did in *Shutt* does not shadow the proposal completely. It is more likely that it wanted the Kansas court to address the question whether laws actually conflicted, rather than whether the other states were interested in having their laws applied. *Supra* note 143.

165. The South Carolina case, *Algie v. Algie*, 261 S.C. 103, 198 S.E.2d 529 (1973), provides an example. The plaintiff was seriously injured when a plane flown by her husband, the defendant, crashed in South Carolina. They were domiciliaries of Florida and the flight originated there. Florida's rule of interspousal immunity would have shielded the defendant from liability, but interspousal immunity had been abolished under South Carolina law. The South Carolina Supreme Court permitted plaintiff to recover under South Carolina law. The court's place-of-wrong (*lex loci*) rule led it there because the last event necessary to create the cause of action—plaintiff's injury—took place in South Carolina. *Algie* was typical of place-of-wrong decisions under the original Restatement, in that the South Carolina Supreme Court did not bother to examine the policies underlying either the forum's or Florida's rule.

The result reached in *Algie* would not necessarily be unconstitutional under my proposal, but the South Carolina Supreme Court would no longer be able to rest on *lex loci* to justify it. Florida probably expressed through its interspousal immunity rule an interest in protecting marital harmony of Florida citizens (including plaintiff and defendant) from the strains of interspousal litigation. *Cf.* *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936) (discussed in Annot., 108 A.L.R. 1120 (1936)) (finding such to be the policy behind New York's interspousal immunity rule). The South Carolina situs of the crash clearly provides the forum with a basis for territorial jurisdiction. *See supra* notes 38 & 53 and accompanying text. But it may or may not make South Carolina interested in applying its law. That will depend on the policy advanced by South Carolina's abolition of its interspousal immunity rule. If South Carolina finally came to regard the rule as archaic and counterproductive to marital harmony, that would explain the rejection of the rule for cases involving South Carolina marital couples, but would not give South Carolina a legitimate interest in improving marital relationships of Floridians. Given that reading of South Carolina law, it would represent an unconstitutional choice. For the forum to choose it would gratuitously impinge on Florida interests and be unfair to the defendant. If, on the other hand, South Carolina abolished interspousal immunity because of a concern that all those injured in South Carolina should be able to recover, then the policy underlying South Carolina's law is broad enough to make South Carolina interested in *Algie*. Under this scenario, the South Carolina court could constitutionally choose its own law. But my proposal would force the court to depart from its *lex loci* approach and use interest analysis in its decision to demonstrate the legitimacy of its choice.

166. Professor Brilmayer observed that "[a]doption of governmental interest analysis as the constitutional theory would lead to a choice of law bloodbath." *Governmental Interest*, *supra* note 6, at 473 (emphasis in original). However, it is difficult to see how my proposal, that the forum must be interested before it displaces the conflicting law of some other state that is interested, would have such dire consequences. The proposal would only intrude upon the brainless simplicity of the place-of-wrong rule in cases in which the forum used it to apply forum law, and then only if there is a plausible basis for examining whether the conflicting rule of another place might be supported by interest. See the example offered *supra* note 165. Of course, this complication might be enough to induce courts to renounce entirely the original Restatement's place-of-wrong rule in those remaining jurisdictions, *supra* note 163, where it is still in favor. But neither Professor Brilmayer nor the rest of conflicts academe would count that a loss. Writing about the original Restatement, Brilmayer observed: "Aside from the intellectual dishonesty, the basic vice of such a system was that it frustrated the substantive policies of the competing state laws in an arbitrary and capricious manner." *Id.* at 462. For no less sweeping criticisms of the original Restatement, see *supra* note 3.

167. *E.g.*, *Silmaitis v. Flood*, 437 A.2d. 828 (Conn. 1980) (place-of-wrong rule successfully invoked by a Connecticut defendant to deny a Connecticut plaintiff the benefit of Connecticut law permitting recovery); *Jacobs v. Adams*, 505 A.2d 930 (Md. Ct. Spec. App. 1986) (place-of-wrong rule successfully invoked by a Maryland defendant to deny a Maryland plaintiff benefit of more compensatory Maryland law).

how many results would be altered under this extension of the proposal. But one suspects that some would be, that the situs of the wrong is often fortuitous, and that courts are unfairly denying forum citizens the advantages of their own law by choosing conflicting and uninterested law.¹⁶⁸

The problem with so extending the proposal lies in the difference between the forum gratuitously dishonoring and gratuitously promoting the law of another state. It is difficult to see how giving the law of a sister state too much play does any violence to sister-state interests. When extended to this situation, the proposal loses its full faith and credit support.¹⁶⁹ Perhaps continuing due process support is enough. There is much to be said for the view that to use the law of any uninterested place to deprive a litigant of the intended benefits of a rule taken from any interested place (including the forum) violates the freestanding due process clause.¹⁷⁰ But adoption of the rule as I have proposed it would be an easier step for the Supreme Court to take. And that step alone would represent a significant and desirable expansion of the Constitution in regulating choice of law.

VIII. CONCLUSION

Simple propositions about the role of interest analysis as constitutional law are unreliable. It is impossible to state categorically either that interested forums may always apply their own law, or that uninterested forums may never do so.¹⁷¹ But there is enough sense to these ideas that, with some narrowing and refinement, they can contribute greatly to our picture of what constitutional restraints on choice of law should be.

168. *Lex loci* permits no analytically respectable way out in such cases. This undoubtedly is a reason why it has given way to interest analysis in most jurisdictions. See *supra* note 121 and accompanying text and note 163. The distasteful prospect of denying a citizen the intended effect of forum law also has led to evasions of *lex loci*. Courts have devised an assortment of fictions to escape *lex loci* and apply their own law, while purporting to honor the rule. See Morse, *Characterization: Shadow or Substance?*, 49 COLUM. L. REV., 1027, 1056-62 (1949) and Paulsen & Sovern, *supra* note 163, 970-71. Because these reasons for applying forum law are analytically corrupt and only sporadically applied, they do not function as an adequate substitute for interest analysis.

169. *But cf.* *Parsons Steel, Inc. v. First Alabama Bank*, 106 S. Ct. 768, 771-72 (1986) and *Marrese v. American Academy of Orthopedic Surgeons*, 105 S. Ct. 1327, 1333-35 (1985) (suggesting that the full faith and credit statute, 28 U.S.C. § 1738, prevents federal courts from giving greater preclusive effect to a state judgment than the rendering state would give). Supreme Court decisions on this point have not been entirely consistent. Compare *Marrese* and *Parsons*, with *Haring v. Prosis*, 462 U.S. 306, 317-23 (1983) (exploring at length the possibility that a federal court might give greater preclusive effect to a state judgment). For a critique of these developments, see Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209 (1986).

170. See *supra* note 159, and Shreve, *Hague*, *supra* note 45, at 351-53.

171. The classic situation in which the Constitution does not and should not prevent an uninterested forum from applying its own law is the "no interest", or unprovided for, case, in which none of the rules vying for application come from an interested source. For example, assume that plaintiff from State A brings suit in state B against a defendant from state B. B's law permits recovery but B might only be interested in having it applied in favor of a plaintiff from B. See *supra* note 101. A's law bars recovery but A might only be interested in having it applied in favor of a defendant from A. See *supra* note 102. Assume further that neither A nor B are made interested by the location of the parties' conduct. See *supra* note 103. Although an uninterested forum, B should be free under the Constitution to apply its law, since it frustrates no interest behind the conflicting law of A. *Erwin v. Thomas*, 506 P.2d 494 (Ore. 1973), offers an example. "It is apparent," concluded the Oregon Supreme Court, "that neither state has a vital interest in the outcome of this litigation and there can be no conceivable material conflict of policies or interests if an Oregon court does what comes naturally and applies Oregon law." *Id.* at 496-97. On unprovided-for cases generally, see R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS* 303-09 (3rd ed. 1981).

Interest alone should justify application of forum law, unless the facts indicate that the prospect of that result was so concealed from the party aggrieved by the choice that it frustrates his reasonable reliance on the application of more favorable law. To demand more, that the forum be the *most* interested source of law, would take the Supreme Court into treacherous waters. Assigning greater and lesser interests in true conflicts may be an appropriate function of choice of law. But analysis accompanying this technique can be so opaque and applications so controversial that it is best severed from interest analysis recast as constitutional law.

The Supreme Court has offered forum interest as a reason for upholding the forum's choice of its own law for some time; the role of interest analysis in *invalidating* conflicts results has a far shorter history. The most significant dimension of the *Shutts* case may be the extent that it might suggest for interest analysis the added function of curbing conflicts abuses as an element of constitutional doctrine. The actual use of interest analysis in *Shutts* may belie this. The Court's demand that Kansas be interested in applying its own law does not really mesh with its concern that Phillips be protected from unfair surprise. But *Shutts* does contain some ingredients for a better, more expansive test. The best course in subsequent cases may be for the Supreme Court to continue its insistence that the forum be interested in applying its law, continue to draw simultaneously from due process and full faith and credit sources for its constitutional standard, but refine more subtle policies from the two clauses and create a rule that an uninterested forum may not substitute its law for the conflicting law of another state that *is* interested.